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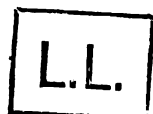
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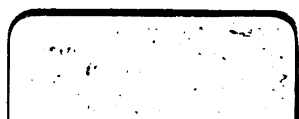




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REPORTS
499
OF
CASES IN LAW AND EQUITY

ARGUED AND DETERMINED IN THE
SUPREME COURT OF THE STATE OF GEORGIA,

CONTAINING THE DECISIONS AT

MACON, PART OF JUNE TERM, 1859, ATLANTA, AUGUST
TERM, MILLIDGEVILLE AND ATHENS, NOVEM-
BER TERMS, 1859; AND SAVANNAH,
JANUARY TERM, 1860.

No. _____
VOLUME ~~LXXIX~~ **Law School**
OF THE
CINCINNATI COLLEGE.

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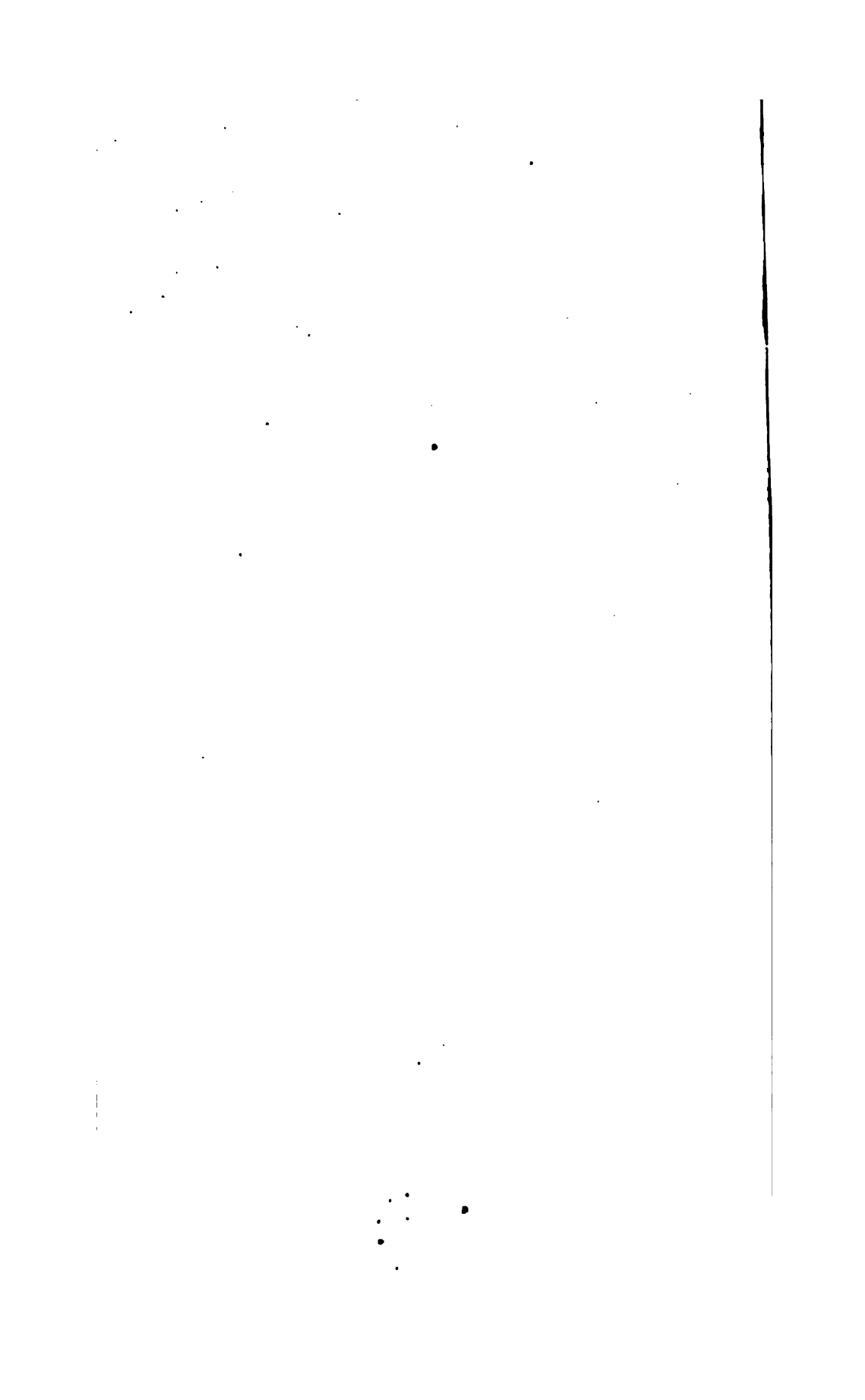


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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON,
JUNE TERM, 1859.

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING,
LINTON STEPHENS, } Judges.

LESSEE OF OLIVER DUDLEY, and JACK HARDMAN, plaintiff in error, vs. CHARLES BRADSHAW, tenant in possession, defendant in error.

Dudley drew a lot of land. Before the grant issued, he conveyed the land by a warranty deed, to Swift, and received from Swift, the purchase money, and Swift took, and by himself or his assigns, kept possession. After the grant issued, Dudley conveyed the lot, by deed, to Hardman—Swift, or one of his assigns, being at the time of the conveyance, in possession. This younger deed was never recorded. Hardman brought ejectment on this younger deed.

Held, That he was not entitled to recover.

Ejectment, in Marion Superior Court. Tried before Judge WORRILL, at March Term, 1859.

This suit was brought by plaintiff in error, for the recovery of lot of land number one hundred and three, in the eleventh district of Marion county.

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On the trial, plaintiff read in evidence the grant to said lot from the State of Georgia to Oliver Dudley, dated 10th December, 1835; then a deed from Oliver Dudley to Jack Hardman, conveying said lot of land, dated the first day of April, 1857, not recorded, and containing the usual clause of warranty. Defendant having admitted possession, plaintiff here closed his case.

Defendant then opened his case, and read to the jury a deed from Oliver Dudley to Allen Swift, dated March 13th, 1828, recorded October 16th, 1858, conveying said lot of land, with the usual clause of warranty; then a deed from said Swift to Thurmond, dated 20th February, 1836, recorded 16th October, 1858; then a deed (without objection by plaintiff,) made by said Thurmond to Thomas R. Greer, dated 3d November, 1851, and not recorded; then a deed made by said Thomas R. Greer to John T. McBryde, dated 6th February, 1857, recorded 29th December, 1857, and then closed his case. McBryde was, by himself or tenant, in possession of the land, at the date of Dudley's deed to Hardman.

The Court charged the jury that, upon the foregoing statement of facts, the plaintiff could not recover, and plaintiff excepted, and now assigns the same as error.

BLANDFORD & CRAWFORD, for plaintiff in error.

SMITH & POU; and PERRYMAN, *contra*.

By the Court.—BENNING J. delivering the opinion.

Oliver Dudley drew the land. In 1828, after he had drawn it, but before he had obtained a grant for it, he made a deed for it to Allen Swift, in which deed, there was a clause of warranty, and, it is to be presumed, the usual receipt for the purchase money. In 1835, the State granted the land to Dudley. In 1836, Swift made a deed for the land, to Thurmond; afterwards, Thurmond made a deed to Greer; and then Greer, a deed to McBryde. Bradshaw was in posses-

sion under McBryde, at the commencement of the action; and this possession, either in Bradshaw, or in him and some one or more of the others, his predecessors in the title, extended back, we must presume, to the date of Swift's deed from Dudley.

This title coming through Swift, was the title under which the tenant in the ejectment claimed.

Dudley, the drawer, made a second deed for the land—a deed to Jack Hardman. This deed was made on the first day of April, 1857; consequently it was made after the issuing of the grant, or whilst Swift, or some of his assigns aforesaid, was in possession under the first deed—the deed to Swift. It is probable, that it was made while Bradshaw was in possession, for he was in possession at the commencement of the suit, and the date of the second deed, was only a few months previous to the commencement of the suit. This second deed was never recorded.

This was the title under which, the plaintiff in the ejectment claimed.

Such being the titles under which, the parties respectively, claimed, the Court charged the jury, that the plaintiff was not entitled to recover. The question is, was that charge right?

The charge was right, if what Swift acquired from Dudley, was the legal title; or if it was "a complete equity," and Hardman had notice of it, when he purchased from Dudley. This we may assume.

First, then, was it the legal title, which Swift acquired from Dudley—the latter being, at the time when he made the deed to Swift, only the drawer, not the grantee? It was, if what Dudley held by his naked draw, was the use, and that use was, by the statute of uses, afterwards, on the payment of the grant fee and the issuing of the grant, executed in Swift, his assignee.

That Dudley's draw gave him at least, the use, the State retaining the legal title, I suppose there can be no doubt.

Whether it did not also give him the legal title—the legal fee subject to be defeated on his failure to pay the grant fee and take out the grant, is, with me, rather the doubt. Let us say, however, that the draw gave him only the use, leaving the legal title still in the State. The effect then of the draw, was, to make the State hold the legal title to his use, a use subject to be defeated by his failure to pay the grant fee and take out the grant.

That use he conveyed to Swift, and thereby, the use passed into Swift, the State still retaining the legal title; and thus the effect was, that the State became the holder of the legal title, for the use of Swift—a use still subject to be defeated, by a failure to pay the grant fee and take out the grant.

While the State was thus holding the legal title, for the use of Swift, Dudley paid the grant fee and took out the grant, the issuing of the grant to him, being evidence, that he had paid the grant fee. Thus the legal title passed from the State, to Dudley, and he became the holder of that title, for the use of Swift—a use then no longer subject to be defeated; but absolute; as, Dudley had paid the grant fee, and taken out the grant. The legal title being thus in Dudley, he stood ‘seized’ of the land “to the use” of Swift—a use then grown absolute and unconditional.

Was this use executed in Swift, by the statute of uses? Did the statute work a transfer of the legal title, to Swift?

The statute declares: “That where any person or persons stand or be seized” “of, and in, any” “lands,” “to the use, confidence, or trust, of any other person,” “by any manner, means, whatever it be,” the person or persons that have “any such use, confidence or trust,” “shall, from thenceforth, stand, and be seized, deemed and adjudged in lawful seizin, estate, and possession, of, and in, the same” “lands,” “of, and in, such like estates as they had, or shall have, in the use, trust, or confidence, of, or in, the same; and that the estate, title, right, and possession, that was in” the person seized to the “use,” &c., shall be “deemed and adjudged to be in him or

them that have" "such use," &c., "after such quality, manner, form, and condition, as they had before in, or to, the use, confidence, or trust, that was in them." *Schley's Dig.* 183.

This being the statute, and Dudley standing "seized" of the land, to the use of Swift, a use absolute in Swift, it is clear, that the statute must have executed the use, in Swift, by working a transfer of the legal title, out of Dudley, into him, unless there is some other law which came in, and prevented the statute from so doing.

Is there any such law?

Parliament, after passing the statute of uses, at the same session, passed another statute by which, it declared, that no bargain and sale, "except the same bargain and sale be made by writing, indented, sealed, and enrolled," "within six months next after the date of the same writing," &c., shall suffice to create any "freehold," or, "any use thereof." *Sch. Dig.* 174, *note*. But this statute does not apply; because, in the first place, there is nothing in the record to show, that the deed to Swift, was a deed of bargain and sale, and it may have been a feoffment; and, in the second place, this statute of enrollment, was never in force in Georgia—she having in the beginning, made registration laws of her own.

Are not these registration laws such that they have interfered with the statute of uses, in a way to prevent it from executing this use?

These laws extend to deeds of feoffment, and, to deeds of lease and release, as well as to deeds of bargain and sale. *Cobb Dig.* 161. They prescribe a time within which, "deeds" are to be recorded; they declare, that the younger of two deeds, made by the same person, shall prevail over the older, in certain cases; namely, cases in which, the younger deed is duly recorded, and the older not, and the donee in the younger, has not, when he accepts it, any notice of the older. The effect of this, is, that in these cases, the older deed becomes void, in relation to the younger.

May it not be, that these registration laws themselves—

these registry Acts of our own, so interfere with the statute of uses, as to prevent it from executing the use, in such a case as the present?

Why say the registry Acts? A rule to be deduced from the registry Acts, as construed by this Court, may, I think, be thus stated: A younger conveyance, if recorded within the time prescribed by the Acts, shall prevail over an older conveyance, made by the same person, if the donee in the younger, have no notice of the older, when he accepts the younger, but that, if the older have been itself recorded within the prescribed time, the presumption shall be, that he did have such notice of the older. Notice is to be the test; but recording in due time, is to be conclusive evidence of notice. And from this rule, there would seem to follow, this corollary, that a younger conveyance, if duly recorded, shall prevail over an older agreement to convey, if the purchaser under the conveyance, have no notice of the agreement to convey; because what is sufficient to prevail over a thing completed, ought to be sufficient to prevail over the same thing not completed; and a conveyance is but a complete agreement to convey; therefore, what is sufficient to prevail over a conveyance, ought to be sufficient to prevail over an agreement to make the conveyance.

Whether recording the agreement to convey, would be notice of that agreement, to the subsequent purchaser, is another question. If the agreement was one amounting to a deed of bargain and sale, it would, I think, be recordable; and if recordable, the record of it, would be notice of it, to subsequent purchasers. It is clear, that the registration acts all provide for the registration of deeds of bargain and sale. (*Pr. Dig.* 158, 160, 162.) And an agreement to convey, may amount to a deed of bargain and sale. Blackstone says of the deed of bargain and sale, that it "is a kind of real contract, whereby the bargainer, for some pecuniary consideration, bargains and sells, that is, contracts to convey, the land to the bargainee, and becomes by such a

bargain, a trustee for, or seized to the use of, the bargainee : and then the statute of uses completes the purchase ; or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession." (2 *Black. Com.* 338.) So, Cruise says ; " The proper and technical words of this conveyance, are, " bargain and sell ;" but *any other words* that would have been *sufficient to raise a use* upon a *valuable consideration*, before the statute, are now sufficient to constitute a good bargain and sale." *Tit. 32, ch. 9, sec. 4-5, of Cruise's Dig.* And, in proof of this proposition, he gives, among other cases, this one ; " if a person covenants, in consideration of money, to stand seized to the use of his son, in fee ; if the deed be enrolled, it will be a good bargain and sale, though the words bargain and sell, be not used. (*Id.* 7.) And if a covenant to stand seized, would, why would not, a covenant to convey ?

So, Sugden says ; " Equity looks upon things agreed to be done as actually performed ; consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money, for the vendor." 1 *Sug. Vend. and Pur.* 274.) And there can be no doubt, I suppose, that this is so.

Then an agreement to convey, may amount to a deed of bargain and sale. When does it do so ? It does so, I suppose, when the part of it, to be performed by the purchaser, has been fully performed by him ; as, when he has paid the whole of the purchase money.

The present case, however, is not the case of an agreement to convey ; it is the case of an actual conveyance. Dudley, the drawer, made a conveyance of the land to Swift. We may, therefore, dismiss the corollary, and confine ourselves to the rule.

Some of the cases in which, a younger deed will, by this rule be made to prevail over an older, will be cases in which the older, (if operative,) would convey only a use ; as, the case, in

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which, the vendor had himself only the use, when he made the older deed, and acquired the legal title afterwards. In this case, the statute of uses would say, that the older deed should prevail over the younger, for it would say, that, as soon as the vendor acquired the legal title, that title was to be "adjudged" as instantly transferred from him to the person to whom he had previously conveyed the use, by the older deed. But the registry Acts in effect, say the contrary; they say, as we have seen by the rule deduced from them, that in all cases, the younger deed if duly recorded shall prevail over the older, if the donee in the younger has no notice of the older—that, however, he is to be deemed to have had notice of that deed, if that deed was regularly recorded. They, therefore, say this, in the case in which, what the older deed conveyed was only the use. So far, then, as that case is concerned, they *do* interfere with the statute of uses, and in effect repeal it.

Their precise operation, probably, is this—they do not prevent the first conveyance from passing the legal title out of the vendor into the vendee, in any case; but, in some cases they, nevertheless, impart, to the vendor, the power, the capacity to convey that legal title to a second purchaser; viz, in cases in which, the first conveyance is not duly recorded, and the second is, and in which, the second vendee purchases without notice of the first conveyance; so that, though they may not actually prevent the statute of uses from executing the use, they enable the vendor to defeat the use, after it is executed.

Is the present case, that case? Granting that the present is a case in which Dudley's first deed—the deed to Swift conveyed only the use, yet it is not a case in which the second deed from Dudley—the deed to Hardman, is to prevail over that first deed; for in the first place, the second deed was not recorded at all; and in the second place, Hardman, the donee in it, had, when he accepted it, notice of the first, for, at that time, Swift, or some of those claiming under

him, was in possession of the land. Then the present case is *not* that case.

It follows, then, that the registration laws do *not* so interfere with the statute of uses, as to prevent it from executing the use, in the present case; that is, that they do not repeal the part of that statute, which covers this case.

Is there not some other statute that does? If there is we are not aware of it.

Let us suppose however that there is. This supposed, then, the statute of uses will be out of the case, and the question will be, what, that statute out of the case, was the effect of the payment of the grant fee and the taking out of the grant? And the answer will be, that the effect was, to cause the legal title, which the State had been holding for the use of Swift ever since Dudley's deed to Swift, to pass out of the State into Dudley, not, to be instantly passed on, by the statute of uses, out of Dudley into Swift, but to remain in Dudley to be held by him for the absolute unconditional use of Swift, until he should be required by Swift, to make to him, Swift, a conveyance of that legal title. The absolute, unconditional use was in Swift; the mere naked legal title was in Dudley. This was the effect. Nothing remained to be done by Swift; he was not bound to reimburse Dudley the grant fee, for his deed from Dudley contained Dudley's warranty of title, and that bound Dudley to pay the grant fee—to remove any incumbrance. He had the right on mere demand, to a conveyance of the legal title from Dudley. This being so, we may say that Swift had what this Court has called "a perfect equity."

The effect then of the payment of the grant fee and the taking out of the grant, was, the statute of uses laid out of the case, to give the legal title, to Dudley, and, "a perfect equity," to Swift. And this is the answer to the second of our two main questions.

A perfect equity is, in Georgia, a good title even at law; it is a title sufficient to support or to defeat ejectment. (*Pitts*

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vs. Bullard 3 Kelly; Peterson vs. Orr, 12 Ga.) This is due probably to the Act of 1820, which says, that if a party "conceives" that he can establish his claim without resorting to the conscience of his adversary, he may sue at law and should not be forced to sue in equity. (*Pr. Dig.* 447.)

Against whom is this perfect equity, good? It is good against the person holding the legal title, and all claiming under him with notice of that equity.

In the present case, therefore, the perfect equity in Swift was good against Dudley who held the legal title, and good against his assignee of that title, Hardman, if Hardman purchased that title with notice of the equity. And that Hardman did do, for when he purchased Swift or some one claiming under Swift was in the possession of the land, and possession is notice at least *prima facie* of the title under which it is held.

Whether, then, the statute of uses is in the case, or out of the case, the result is the same. If it was in the case, it executed the use in Swift, and he, or his assigns, had the legal title, and that title was a good defence to the action; and if it was out of the case, Swift's payment of the purchase money to Dudley, and Dudley's paying the grant fee and taking out the grant, gave Swift, a perfect equity, leaving in Dudley nothing but the naked legal title, and that perfect equity was a good defence to any ejectment brought by Dudley, or, by any one claiming under him, with notice of the equity; and Hardman, the lessor of the plaintiff, in the present ejectment, was a person claiming under him with notice of the equity.

Either way then, we think that the charge was right.

It was suggested by the counsel for the plaintiff in error, that there is a want of harmony in the decisions of this Court, on the questions involved in this case. He especially cited *Bivins vs. Vinsant*, 15 Ga. 521, as a case in conflict with *Henderson vs. Hackney*, 24 Ga.

If it is in conflict with that case, it is in conflict with the

conclusion to which we have just come, in this case, for that conclusion harmonizes with that case. I must, therefore, notice the suggestion.

In *Bivins vs. Vinsant*, 15 Ga. 521, the *decision*, was that the older deed was admissible, and it was a deed made before the issuing of the grant. The *decision*, then is in harmony with the conclusion to which, we have just come; and with the other decisions, as it will be seen. The great question in the case, was, whether the older deed was not an estoppel upon the claimants under the younger deed, estopping them from saying, that the common donor had nothing in the land, when he made the older deed; and the attention of the Court, was chiefly directed to this question. The Court regarded the argument of estoppel, as not well founded, and, therefore, as not sufficient, to authorize the admission of the older deed; but the Court found another argument, for its admission, which it did deem sufficient, and that was an argument founded on this very doctrine, that a complete equity is equal to the legal title. True, the Court failed to advert to the fact that the issuing of the grant to Vinsant, was evidence of the payment of the grant fee, and, therefore, that the case was one of a perfect equity, (one of a use executed by the statute of uses) but the Court did fully sanction the principle, that when a complete equity does exist, it is good in ejectment, whether for offence or defence. The truth is, that this part of the case, was hardly argued at all, almost the whole force of the counsel on both sides, being spent on the question of estoppel.

In *Faircloth vs Jordan* 18 Ga. 350, the Court in like manner recognized the principle, that a perfect equity is equal to the legal title, but the Court thought that the facts did not make out a case of a perfect equity. According to the facts, both deeds were recorded, but the recording of the younger, was in time, the recording of the older, was not in time. And proof was offered, to show, that the donee in the younger deed, had notice of the older deed, when he

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took the younger. This Court would now hold that the proof ought to have been received, and then that the facts would have made out a perfect equity, in the donee of the older deed. In this respect, the views of the Court, as to the construction and effects of the registry Acts have undergone a change; a change which, I own, went hard with me. *Hand & Cook vs. McKinney*, 25 Ga. 648.

In *Henderson vs. Hackney*, 24 Ga. 383, the older deed made before the grant had issued, was duly recorded. Therefore, there was, in the donee in that deed, a perfect equity as against the donee in the younger deed made after the grant had issued. This was the fact, and this will support the decision, although the decision is not expressly put on this, as its ground; but is rather put, on the ground, that the use in the holder of the older deed, was on the issuing of the grant, executed in time, by the statute of uses.

In *Goodson vs. Beacham*, 24 Ga. 151, there was a perfect equity in Beacham. Goodson claimed under her father. He was not a purchaser for a valuable consideration, but a mere squatter; and when she purchased his interest, such as it was, she had actual notice of Beacham's title.

In *Helms vs. O'Bannon*, there was a perfect equity in Helms; and May had notice of it, when he purchased, for when he purchased, Helms was in possession. 26 Ga. 132.

In *McLeod vs. Bozeman*, the younger title was merely void. 26 Ga. 178.

In these cases, the Court only followed the older cases of *Pitts vs. Bullard*, 2 Kelly; and *Peterson vs. Orr*; 12 Ga. R.

At bottom then there does not seem to be a great want of harmony in the decisions.

Judgment affirmed.

**WALTER S. CLARK, and others, plaintiffs in error, vs. THE
PIGEON ROOST MINING COMPANY, defendant in error.**

- [1.] A question of contested right of possession cannot be settled by an order at chambers, on the affidavit of one party and without notice to the other.
- [2.] When such an order has been passed in favor of the complainant in a bill, and then the bill dismissed by complainant without the knowledge of defendant, the latter has a right to have the case reinstated in order to have the first illegal order set aside.
- [3.] Service of a bill of exceptions on counsel who procured the decision brought up for review, although he may say he had *ceased* to be counsel before he was served, is good service. He *can't* cease.

In Equity, motion to reinstate cause, &c. Before Judge
WORRILL, in Muscogee Superior Court, May Term, 1859.

A bill was filed by the Pigeon Roost Mining Company, against the defendants, who are the sons and widow of Michael N. Clark, deceased, to obtain the possession of the books, papers, title deeds, bills, drafts, correspondence, &c. belonging to said company, in the hands and custody of said Michael N. Clark, at the time of his death, who had been Secretary of said company, and which afterwards came into the hands of defendants, and who refused to deliver up the same. The bill also prayed that defendants be enjoined from transferring, using or misappropriating any of said papers, deeds, bills or books, &c. The bill was sworn to by James Wood, styling and representing himself the President of said Pigeon Roost Mining Company.

Defendants pleaded that there was no such corporation as the Pigeon Roost Mining Company; that said company had no organization under its charter, and that complainant could maintain no action in the premises.

Besides their plea, defendants answered said bill, alleging that no administration had been taken out on the estate of Michael N. Clark, deceased, and that the same was unrepresented, and that said books, deeds, papers, &c., were in their custody and possession to be disposed of as the Court should

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order and direct. They admitted, that they did refuse to deliver said papers, &c., to Wood, believing as they did, that he had no legal right to their possession, and because they thought it was *their* duty to keep and preserve the same, and because their father, the said Michael N. Clark, and the defendants, as his heirs at law, had an interest in the same, and in the matters and subjects to which they related.

Judge Worrill, on the 3d December, 1858, granted an order, appointing Wiley N. Hutchins receiver, and requiring the defendants upon five days notice, to turn over to said receiver, all the deeds, books, papers, &c., belonging to complainant, in their hands, custody or possession.

Afterwards upon petition, in which it was alleged that there had, on the day of filing said petition, been a legal organization of said company, and a board of directors and officers duly elected, an order was passed, directing Hutchins, the receiver, to turn over all the papers, &c., to Isaac Cowl, the treasurer elect of said company. In pursuance of this order the receiver, on the 21st January, 1859, turned over and delivered said books, papers, &c., to Cowl, the treasurer.

At the May Term, 1859, of Muscogee Superior Court, counsel for complainants moved to dismiss the bill, stating at the time, that the object for which the bill had been filed, had been accomplished; to which motion counsel for defendants objected. Afterwards, during the same Term of the Court, without notice to defendants or their counsel and without their knowledge, as counsel stated in his place, the Court upon renewal of the motion, granted the order dismissing said bill. Afterwards, at the same Term of the Court, defendants counsel moved that complainant's solicitor show cause, why the order dismissing said bill, should not be set aside, as having been granted improvidently; also moved that complainants show cause so soon as counsel can be heard, why the order granted by the Chancellor on the 14th day of January, 1859, directing the books, papers, &c.,

mentioned in said bill to be delivered by the receiver appointed in this case, to Isaac Cowl, who was represented to be the Secretary of said complainant, should not be set aside and annulled, and said papers returned to the possession of said receiver.

1st. Because no notice of the application for said order was given to defendants, and no opportunity given to them of resisting the same.

2d. Because said order operates as, and in fact is, a final decree in the case, adjudicating the rights of the parties and should not have been granted in vacation and without the intervention of a jury.

On behalf of complainant the receiver was introduced, and stated that a short time after said order was granted, directing him to turn over said papers, &c., to Isaac Cowl, he exhibited said order to one of the defendants, who after showing the same to his counsel, returned it without objection.

After argument, the Court overruled and refused both of the above stated motions. Whereupon, counsel excepted and assigns the same as error.

WILLIAM DOUGHERTY, for plaintiffs in error.

H. HOLT; and JONES & JONES, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] The defendants in this case, while admitting that the papers in their possession belonged to the Pigeon Roost Mining Company, denied in their sworn answer, that said corporation had any existing organization entitled to represent it, and denied positively that Wood had any such authority, and asserted their interest in the papers as heirs at law of Michael N. Clark, who died a large stockholder in said company. After this answer came in, Wood filed his affidavit by way

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of amendment to his original bill, stating that he had cured the defect in his right to sue by getting up the requisite organization *after the answer filed*. Whereupon, the Chancellor, *at chambers, and without notice* to the defendants, passed an order for the delivery of all these papers to Cowl, who appeared from Wood's affidavit, and from that only, to be treasurer under the *new organization*. That is to say, Wood, *by force of his own affidavit alone*, got possession of valuable papers from persons who, at the last time when they had a hearing, were protesting and swearing that they had a deep interest in the papers, and that Wood nor anybody else was entitled to the possession of them. To state this case is to decide it. Even a possessory warrant provides for a hearing, and for security for the property, but here a question of contested right of possession was settled by *changing* the possession on the affidavit of one party, and without notice to the other. Well might the bill have been dismissed after that—it had settled the whole business. It had accomplished what we think could have been done legally only on a regular trial before a jury. We think the defendants had a right to have that order set aside as having been improvidently and illegally passed, and for that purpose they had a right to reinstate the case after it had been dismissed without their knowledge. They were entitled to both the orders moved by them.

[2.] There was a motion in this case to dismiss the writ of error for want of service. It was served on the counsel who represented the defendant in error in procuring the very orders and refusals of orders, which are brought up for review. But it was said they had *ceased* to be counsel when they were served. The reply is, that under the statute prescribing service on attorneys, for the purpose of receiving service, they *could not* cease. We think the service was good.

Judgment reversed.

Judge BENNING being related to one of the parties, did not preside in this case.

Burney, adm'r, *ex parte*.

Ex-parte, MILTON L. BURNEX, administrator of JOSEPH BLOUNT, deceased.

- [1.] An administrator is not entitled to commissions on *property* turned over by him to a distributee.
- [2.] The statute organizing the Supreme Court, makes no provision for the hearing of *ex parte* cases.

Appeal from the Court of Ordinary. Tried before Judge LOVE, in Houston Superior Court, May Term, 1859.

Milton L. Burney, administrator of Joseph Blount, deceased, by his petition to the Court of Ordinary of said county, set forth that under and by virtue of an order of said Court, he had distributed to the heirs of the said Joseph Blount, the negroes belonging to said estate; that by the commissioners appointed by said Court to make said distribution, the negroes were valued at the sum of ten thousand three hundred and twelve dollars, (which was a fair valuation.)

The petitioner asked for an order and judgment of said Court allowing him two and a half per centum, as commissions, on the said sum of ten thousand three hundred and twelve dollars.

The Ordinary refused to grant said order; and on appeal to the Superior Court, a jury, under the charge of the Court, found a verdict affirming the judgment of the Ordinary, refusing the application. To this charge and finding the administrator excepted, and now assigns the same for error.

HUMPHRIES, for plaintiff in error

By the Court.—STEPHENS J. delivering the opinion

- [1.] It is a clear case, that an administrator is not entitled, at least not as a matter of right, to commissions on *property*

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turned over by him to a distributee, for this case is *expressly excepted* from the statute fixing commissions.

[2.] But while we express the above opinion, we protest against its being drawn into a precedent authorizing this Court to entertain *ex parte* cases, for the statute organizing the Court, makes no provision for such cases. But as in this case, the effect is the same, whether we affirm the judgment or dismiss the case, we affirm the judgment.

Judgment affirmed.

H. M. KEY and E. O. SHEFFIELD, plaintiffs in error, vs.
ALEX. J. ROBISON, administrator, defendant in error.

Where a common-law suit is pending, and the defendant in it, files a bill in the same county, against the plaintiff, who resides in a different county, asking relief and injunction, the jurisdiction is good for the injunction, but not for the relief.

In Equity, in Dooly Superior Court. Decision by Judge LAMAR, at Chambers, January, 1859.

Homer M. Key and Edward O. Sheffield filed their bill against Alexander J. Robison, administrator of Seymour R. Bonner, deceased, to enjoin certain actions at law, pending in Dooly Superior Court, against complainants, on certain promissory notes. These notes were given by complainants to Bonner in his lifetime, in part of the purchase money of three lots of land, sold to or bought for them by Bonner, situated in the county of Worth. Bonner resided in the county of Muscogee, where his administrator,

Robinson, the plaintiff in the actions at law, also resides ; complainants, who were the defendants at law, reside in the county of Dooly.

The Judge refused his sanction to the bill and to grant the injunction prayed for, on the grounds that the defendant Robison, did not reside in the county of Dooly, but in the county of Muscogee, and that the bill not only prayed to enjoin the actions at law pending in Dooly county, but sought a decree against the defendant, to set aside and cancel the alleged fraudulent sale, and to compel him to refund money paid and expended in the action of ejectment, wherein one of the lots of land had been lost. That it was not merely a bill for injunction and discovery, but also for relief.

To which refusal and decision, counsel for complainants excepted.

P. J. STROZIER ; and T. H. DAWSON, for plaintiffs in error.

MARSHALL DEGRAFFENREID, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

The only question here is as to the jurisdiction, the defendant in the bill not residing in the county where it was brought. The bill asks relief and an injunction. In *Dew vs. Hamilton*, 23 Ga. Reports, this Court held, that the jurisdiction was good in just such a case, for the injunction. It had frequently been ruled before, that it was not good for relief. We think in this case, the bill ought to have been retained for the injunction, but not for the relief. As the Court dismissed it altogether, the judgment must be reversed.

Judgment reversed.

O'Byrne vs. The State.

BRIDGET O'BYRNE, plaintiff in error, vs. **THE STATE OF GEORGIA**, defendant in error.

- [1.] The practice of *striking* a jury in petty offences where the accused is allowed seven *challenges*, and the State five, is now too well settled as an equivalent for challenging, to be overruled as an inadmissible practice in that particular class of cases.
- [2.] Where there is evidence going to impeach a witness, it is error in the presiding Judge, after giving a charge as to the effect of impeaching evidence, then to express a doubt whether such charge is applicable to the case.

Indictment, in Bibb Superior Court. Tried before Judge COCHRAN, at May Term, 1859.

The plaintiff in error was indicted and found guilty of unlawfully furnishing a slave with spirituous liquor. Her counsel moved for a new trial on the following grounds, to-wit:

1st. Because the Court erred in refusing to allow prisoner to challenge peremptorily, seven of the panel of petit jurors put upon her. Her counsel claiming the right under the statute to such challenge before proceeding to strike a jury.

2d. Because the Court erred in refusing to permit prisoner's counsel to ask Thomas Pearce, a witness introduced by defendant, after the State had closed, "if in a case in which Fanny Bell (the principal witness for the State) was interested or had prejudice, from his general knowledge of her character, he would believe her on oath?" To this ground, is added—same question allowed subsequently to another witness, and also leave granted to prisoner's counsel to recall Pearce and ask him the question, being still within call of the Court.

3d. Because the Court when requested by prisoner's counsel to charge, "that when a witness is impeached, the jury may or may not believe her testimony as they in their judgment may determine"—did so charge, but added that "he doubted whether it applied to this case or not."

4th. Because the verdict was contrary to law and the evidence.

After argument, the Court refused the motion for a new trial, and counsel for prisoner excepted.

W. K. DEGRAFFENREID; and WM. T. MASSEY, for plaintiff in error.

Sol. Gen. MONTFORT, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] In petty offences, the practice of *striking* a jury, has been so long and so uniformly held to be an equivalent for challenging as provided by statute, that we are not disposed at this late day to hold it an inadmissible practice in that particular class of cases. The first assignment of error therefore is overruled.

[2.] In this case, there was the testimony of two witnesses that from their knowledge of the general character of Fanny Bell, the State's main witness, they would not believe her under oath in a case where she had either an interest or a prejudice; and it was also in evidence that she had had with defendant a difficulty which remained unsettled. This therefore, was evidence going to her impeachment. The Judge charged the jury as to the effect of impeachment where successfully made out, and then expressed a doubt whether the charge was applicable to the case. This was equivalent to saying that he doubted whether the defendant had made out a case of impeachment, and this again is a clear intimation of his opinion as to the evidence, contrary to the statute prohibiting such intimations. The judgment must be reversed on this ground, without considering the other ground which was abandoned in the argument.

Judgment reversed.

Billing, vs. Rutherford, receiver.

SAMUEL A. BILLING, plaintiff in error, vs. ADOLPHUS S. RUTHERFORD, receiver, defendant in error.

Equity will not aid a plaintiff in *fi. fa.* to remove a cloud from a portion of defendant's property, when there is plenty of other unincumbered property out of which the money can be made.

In Equity, from Muscogee Superior Court. Decided by Judge Worrill, at May Term, 1859.

Samuel A. Billing filed a bill in the Superior Court of Muscogee county, against A. S. Rutherford, receiver of Daniel McDougald's estate, Robert E. Dixon, administrator of said estate, and Seaborn Jones, in which he alleged, that he had a judgment against the administrator of McDougald; that McDougald, before his death, made a deed to Jones and Alexander, as trustees, conveying all his property, by which deed it was provided, that the trustees should first pay, out of the proceeds of said property, their expenses and compensation; that they should secondly pay, as preferred creditors, such of the creditors of McDougald as should, within six months, file with the trustees releases to him; that they should finally pay those creditors who did not file releases, and turn over the balance to McDougald; that Rutherford had been appointed receiver of the property under that deed; that in consequence of said deed he, Billing, could not collect his money, and that the property would not sell for its value under such an incumbrance.

The prayer of the bill was that the deed be declared void.

A decree *pro confesso* was had against Dixon and Jones, and Rutherford filed an answer admitting Billing's debt, the making of the deed, and his appointment as receiver. He denied that the deed was void, and set up, as a defence, that after the making of the deed, McDougald acquired other property than that conveyed by the deed, (which was then in the possession of Dixon, administrator,) of more than suf-

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ficient value to satisfy Billing's judgment; which defence was admitted to be true in point of fact.

At the May Term, 1859, of the Superior Court of Muscogee county, the parties went to trial on the bill and answer alone; and after argument, the complainant requested the Court to charge the jury, that said deed was void as to complainant. This charge the Court refused to give, but did charge, that the deed was legal and valid; to which refusal to charge and to the charge given, the complainant excepted and assigns the same as error. The jury found a verdict for the defendant.

JOHNSON & SLOAN, for plaintiff in error.

DOUGHERTY, *contra*.

By the Court.—STEPHENS J. delivering the opinion

It was an undisputed fact in this case, that there was plenty of unencumbered property out of which Billing's *fi. fa.* could be satisfied. He does not even make a suggestion that the encumbered property would not bring enough under the encumbrance to pay him. *That* was the only point in which he, as a creditor, was concerned—the getting of payment. He stands, then, in the attitude of asking equity to aid him in getting his debt, when he shows a common law remedy in his hands, and that he has no *need* of the aid he asks. On the case, as made by the bill and answer, (uncontroverted,) he clearly had no claim to equitable interposition, and we therefore affirm the judgment, without considering whether the charge was right or not. It is enough that the plaintiff in error has no right to complain of its being wrong.

Judgment affirmed.

Ham vs. Hamilton.

STEPHEN R. HAM, plaintiff in error, vs. BENJAMIN B. HAMILTON, defendant in error.

Where parties settle a case of fraud with their eyes open, the settlement is binding.

Bill for discovery, relief and injunction. Decision by Judge LAMAR, at chambers, 6th April, 1859.

This bill was brought by Stephen R. Ham, against Benjamin B. Hamilton, of the county of Dooly. The bill charges, that some time in the month of December, 1856, Hamilton proposed to sell to Ham, a settlement of land in Dooly county, containing five hundred and thirty acres. There were three parcels of the land—two whole lots and a part of another lot. The price demanded for the land was twenty-six hundred and fifty dollars. Complainant was willing to give that sum for the land, provided the titles were full and complete, but otherwise he would not have been willing to give half of it. Hamilton produced a bundle of papers, and said the titles were perfect, but that he might have left some of the deeds at home; that if any had been left he would furnish them.

Complainant, being unable to judge of the validity of land titles, and two men who were present, (one Hunt and James G. Brown,) remarking that the titles were all perfect and complete, and that complainant might rely upon Hamilton's statements, and relying solely upon the statements of Hamilton, in regard to the titles to the land, gave Hamilton his notes for the sum of \$2,650, and took from him a deed to said lands. Hamilton, at the time, promised if the title papers were not complete, to get those he had left at home and send them to complainant.

One of these lots was situated between the other two; had about thirty acres of cleared land on it, and about seventy-five acres under good fence, and ready to be cleared; had on it

a good situation for putting up a gin house and screw, and a suitable location for a residence. This lot is worth as much as both the others together, on account of the superior quality of the land. This middle lot is the key to the settlement of lands, and without it the other two would be worthless for the purpose for which complainant bought them.

The bill further charges, that a few days after the purchase, Ham took the title papers to Vienna, and submitted them to an attorney, when it was ascertained that the chain of title to said middle lot consisted of a copy plot and grant, a quit-claim deed from Warren (not the grantee,) to Brown, and a quit-claim deed from Brown to Hamilton. Complainant immediately called on Hamilton for the other links in the chain, but Hamilton did not have them, and could not furnish them. Complainant then demanded of Hamilton a cancelation of the trade. Hamilton refused to cancel it, unless complainant would pay him eight hundred dollars; but insisted that complainant should keep the land, stating that it had been used five years, and that in two years more complainant would acquire a good title to it by the statute of limitations. Complainant would not agree to keep it, saying he did not wish to get a title in that way, and that he had bargained and paid for a good and honest title. Complainant did not go into possession of the land. Hamilton refused to cancel the trade. A short time afterwards, complainant called on a lawyer, who advised him that he could make no defence to the notes given to Hamilton for said land. Under this advice, (inasmuch as complainant was unwilling to risk the danger of putting the extensive improvements which he had intended making on said land,) complainant made a compromise with Hamilton, giving him his note for the sum of four hundred and thirty-two dollars, and Hamilton delivering up to complainant his note for \$2,650 00. Complainant also reconveyed the three parcels of land back to Hamilton.

Upon this note of \$432 Hamilton subsequently sued Ham.

Ham vs. Hamilton.

Judgment was confessed, and an appeal taken, and the suit is now pending in the Superior Court of Dooly county.

The bill further charges, that Hamilton procured Warren and Brown to make to him their quit-claim deeds, well-knowing that they did not *bona fide* claim the land, and with the view of cheating the true owner out of his land, by the aid of the statute of limitations, or of making a large sum of money out of some one else.

The prayer of the bill is for a perpetual injunction of the common law suit. Judge LAMAR refused to sanction the bill for want of equity, and complainant excepted, and now assigns said refusal for error.

DAWSON & KIBBEE, by ANDERSON, for plaintiff in error.

MOUNGER & DEGRAFFENREID, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

If the complainant ever had any equity, it is clear he has *settled himself* out of it. He made a deliberate settlement of all the alleged fraud, with his eyes wide open. Parties may settle frauds as well as any thing else, if they act with knowledge of the facts; and such a settlement is as effectual when made by the parties, as when made by a Court. He is here asking the Court to act where he has already himself taken final action. There must be an end to litigation.

Judgment affirmed.

CHARLES MYGATT, for another, plaintiff in error, vs. WILLIAM H. PRUDEN, defendant in error.

When the maker of a note offers it in evidence to prove that he has paid it off, it is incumbent on him first, to prove that the paper which he offers is the one which was in circulation.

Complaint, in Clay Superior Court. Tried before Judge KIDDOO, at March Term, 1859.

The facts are sufficiently stated in the opinion of the Court.

DOUGLASS & DOUGLASS, for plaintiff in error.

PERKINS, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

Mygatt had a verdict for a small sum, and moved for a new trial on the ground, that from the evidence, he ought to have had just a hundred dollars more. The only controversy was about the hundred dollars. The parties had cross demands, all of which were acknowledged to have been originally correct, but Pruden claimed that Mygatt's account against him ought to have been credited with a hundred dollars, he showing a receipt from Mygatt for so much cash. Mygatt replied that he had not kept that hundred dollars for his own use, but had applied it, at Pruden's request, to the payment of a note which Pruden owed to Whitlock, Nichols & Co. The reply is good, if true. There is no conflict in the evidence. Warner testifies that he, as clerk for Mygatt, paid out of Mygatt's funds \$118 55, in taking up some note against Pruden. He does not remember what note it was, but does remember the amount paid on it by him, on account of an entry made by him at the time in Mygatt's check book. Strangely enough, Pruden introduced in evidence the Whitlock, Nichols & Co. note, and it

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appeared to have been taken up (from an entry on it) by payment of exactly 118 55, the precise sum which Warner had paid out of Mygatt's funds for Pruden. This clearly makes an item of \$118 55 in favor of Mygatt against Pruden; but it appears from a letter of Pruden's, that he had paid Mygatt the \$18 55, thus reducing the item to just \$100 00. But Mygatt's account against Pruden, covering this very time, contains no such item. Now if Mygatt applied the hundred dollars for which he gave his receipt, to the payment of Pruden's debt to Whitlock, Nichols & Co., it is clear that it should not be credited on his demands against Pruden. But if he applied that hundred dollars as a payment to himself, then Pruden ought indeed to have credit for it, but Mygatt ought to have put into his account another item of \$100 00 against Pruden, for so much money paid to his use. The dilemma is complete. In either case Mygatt was entitled to have a verdict for \$100 00 more than he got, and we think the verdict was contrary to the evidence.

Pruden was allowed, against the objection of the plaintiff, to read in evidence a note, which he said was the Whitlock, Nichols & Co. note, without proving that the paper which he produced had ever been in circulation. We think this was error, though from the confirmation which the paper gave to Warner's testimony, it seems as if the plaintiff was benefitted rather than injured by it; however, it was illegally admitted. When he relied on his possession of the note to show that *he* and not the plaintiff had paid it off, as was his evident object, the very gist of the proof, was in showing that as the possession was now in him so it *had been* in the payee. His possession alone was not sufficient to raise an inference that he had paid it—it took the two things together, his present possession and the former possession of the payee, to raise such an inference.

Judgment reversed.

JOHN DOE, ex dem. plaintiff in error, vs. RICHARD ROE, casual ejector, and NORMAN H. LEWIS, tenant in possession, defendant in error.

[1] An affidavit of a subscribing witness to a deed, that he saw the feoffor "assign" it, is not sufficient to authorize the record of the deed, and a record made on such an affidavit is a mere nullity—is no evidence of anything, but is mere hearsay.

[2.] In ejectment there can be no recovery of the premises upon a demise from a dead lessor, but there may be a recovery of *costs* on such a demise, if the lessor be living at the commencement of the suit, though dead at the time of the trial.

Ejectment, in Stewart Superior Court. Tried before Judge KIDDOO, at April Term, 1859.

This was an action of ejectment by Doe, *ex dem.*, against Doe, casual ejector, and Norman H. Lewis, tenant in possession, for lot of land No. 33, in the 20th district of Stewart county.

The declaration contained four demises; from Jonathan Stanford, George Gunby, Benjamin T. Bethune, and Robert M. Gunby, administrator of Benjamin T. Bethune, deceased.

Upon the trial, plaintiff proved that defendant was in possession at and before the commencement of the suit. He then read in evidence a grant from the State to Jonathan Stanford of Warren county, for the lot in controversy, dated 7th December 1836, and here rested his case.

Defendant offered and read in evidence a copy deed, (first proving the loss of the original) from Jonathan Stanford to J. M. Cason, for the lot in dispute, dated 6th December, 1836, witnessed by Elisha Holiday and Joseph Leonard, J. P. Also a copy deed from the record, from Cason to David W. Poytress, dated 4th November, 1837, both of said deeds recorded 26th February, 1857; the deed from Stanford to Cason purporting to have been made in Warren county.

Defendant then read in evidence a deed for the same lot

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from Poytress to defendant, dated 27th February, 1857, and recorded 10th March, 1857.

Here defendant closed.

Plaintiff in reply, tendered in evidence a copy deed from Jonathan Stanford to George Gunby, dated 8th March, 1836, for the same lot, and recorded 9th March, 1858; the concluding clause as follows: "In testimony whereof, the said Jonathan Stanford hath set his name and affixed his seal the day and date above written;" and the attestation clause as follows: "Signed, sealed and acknowledged in presence of us, Hugh Ticer, Thomas N. Hicks;" and the probate of which was as follows:

"GEORGIA, Warren County—Personally came before me, Hugh Ticer, who being duly sworn, saith that he saw Jonathan Stanford assign the foregoing or within deed for the purposes therein mentioned, and that he subscribed the same as a witness, and saw Thomas N. Hicks do likewise. Sworn and subscribed to before me, July 11th, 1845."

Defendant objected to the introduction of this deed on the ground of its defective execution, attestation and probate. The Court sustained the objection, and rejected the deed, to which ruling plaintiff excepted.

Plaintiff then read in evidence a deed from George Gunby, for the lot in dispute, to Benjamin T. Bethune, and letters of administration granted to Robert Gunby on the estate of said Bethune, deceased.

Plaintiff further read in evidence the depositions of Elisha Holiday of Warren county, that he knew Jonathan Stanford of said county; that he never knew him to make a title to any land at any time, and that he is now dead. A copy of the deed from Stanford to Cason was shown the witness, who swore that he never signed the original deed, and that he did not know of such a deed being made. He knew a Justice of the Peace, Joseph Leonard, thirty years ago, in Warren county; that Jonathan Stanford, as far as he knew,

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was an upright, honorable man. Knew nothing of his making a deed to the land; that he had nothing to do with him, and never signed any instrument for him, and never knew any man in Warren county by the name of Elisha Holiday, but himself.

Plaintiff here closed.

Plaintiff requested the Court to charge the jury, he releasing all *mesne* profits, that although Jonathan Stanford might be dead at the time of the trial, yet if they should believe from the evidence that he did not make the deed purporting to be from him to Cason, that then the plaintiff might recover. The Court refused so to charge, but charged, that if Jonathan Stanford was dead, that they should find for the defendant. To which charge and refusal to charge, plaintiff excepted.

The jury found for the defendant, whereupon plaintiff tendered his bill of exceptions, assigning as error the rulings, decisions, charges and refusals to charge, above mentioned and excepted to.

JOHNSON & SLOAN, for plaintiff in error.

WIMBERLY & EVANS; DOUGLASS & DOUGLASS; and BEALL,
contra.

By the Court.—STEPHENS J. delivering the opinion.

Was the deed offered by plaintiff from Stanford to Gunby, properly rejected? Delivery being an essential part of a deed, no paper can go as a deed without *proof* of delivery. There was no proof of it here. Delivery could not be inferred from possession either of the land or the paper, for it did not appear that either had ever been in the possession of plaintiff or those through whom he claimed, the paper offered being a *copy*, and not an original. The copy, to be sure,

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was in possession of the plaintiff, but the copy did not purport, even to be the paper which was delivered, and the copy proved nothing as to the original. Indeed, the copy was not and could not be evidence at all, except by virtue of proof that it was a true transcript from the original, which original had *first* to be proven. Now was the original proven by the *record*, or rather by the Clerk's certificate of record? We hold not, because the record if made, as the certificate represented it, was not made on legal probate, and so passes for nought. The affidavit on which the record purports to have been made, merely states that the witness saw Stanford "assign," by which of course he meant sign. There is no statement in the affidavit touching delivery. There was nothing to authorize the Clerk to make a record. The record of a deed when made upon the proper official attestation, or proper affidavit of a subscribing witness, is sufficient proof of the execution of the deed, including delivery, but when made without this foundation, is nothing at all. So far from proving the execution of the deed, it don't prove even that there was such an original paper. It is no evidence. A record, unless made in pursuance of law, is mere *hearsay*. The execution of the deed not being proven, the paper was properly rejected.

[2.] As to the charge. This Court has held before, and we adhere to the doctrine, that in ejectment there can be no recovery of the premises on a demise from a lessor who is dead at the time of trial, but there may be a recovery of *costs* by plaintiff on such a demise, provided the lessor were living at the commencement of the suit. We think this is the instruction which should have been given to the jury, instead of the unqualified charge that there can be no recovery on a demise from a lessor who is dead.

Judgment reversed.

LEWIS J. DAVIES, use, &c., plaintiff in error, vs. A. C. FLEWELLEN et al., administrators, &c., of A. H. FLEWELLEN, deceased, defendant in error.

- [1.] A judgment against an administrator for a certain sum to be paid out of specific assets in his hands, concludes him as to the application which is to be made by him of those assets. Any other application of them is a *waste* and in a suit against him or his representatives for such waste, it is no defence to show that there are other creditors of the first intestate.
- [2.] When one party has read in evidence part of a sworn bill, it is the right of the other party to read such other parts as illustrate the same issue.

Debt. Decided by Judge WORRILL, June Term, 1859, of Muscogee Superior Court.

At the July Term, 1842, of the Inferior Court of Muscogee county, L. J. Davies sued A. H. Flewellen, as the administrator of N. H. Harris, on a note made by Harris. The administrator filed a plea to the action, in which he set out, that the only assets he had in hand, belonging to the estate of Harris, were certain notes. It was not plead that there were any other creditors of Harris.

At the April Term, 1843, of the Superier Court, on the appeal, a verdict and judgment was rendered in favor of Davies against Flewellen, administrator, for the amount of his debt, to be recovered out of the notes admitted by the plea to be in the hands of the administrator.

At the December Term, 1854, of the Superior Court of Muscogee county, Davies, for the use of Kookagey, sued A. C. Flewellen *et al.*, the administrators of A. H. Flewellen, on the judgment above mentioned, suggesting a *devastavit*.

Upon the trial of the case, the plaintiff offered in evidence a part of a bill filed and sworn to by A. C. Flewellen, to show that the notes specified in the judgment had been collected by his intestate, which was admitted without objection. The defendant then offered so much of the same bill as related to that point which went to show that certain of the notes spe-

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cified had not been collected, and the excuse therefor. To this the plaintiff objected. The Court allowed that part of the bill to be read, and the plaintiff excepted.

The defendant then offered in evidence two notes made by N. H. Harris, in his lifetime, one in favor of H. S. Smith, and the other in favor of H. K. Hill; to the introduction of which notes in evidence the plaintiff objected. The Court admitted the notes in evidence, and the plaintiff excepted.

The Court charged the jury, that they must find the amount of the assets in the hands of the defendants, belonging to Harris's estate; you will then find the amount of the debts proven to be due by that estate; then if you find for the plaintiff, you will find for the plaintiff his *pro rata* share of those assets. To which charge plaintiff excepted.

JONES & JONES, for plaintiff in error.

JOHNSON & SLOAN, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] The judgment which Davies had against Abner Flewellen, as administrator of Harris, settled two things—the amount of his debt against Harris, and that it should be paid out of the assets specified in the judgment. If Flewellen had notice of other creditors, he was bound to have pleaded the fact before judgment; and the judgment is conclusive against him, that he had no notice of any. If there were creditors who had not given notice, they could not disturb that judgment by notice afterwards. When an administrator, after the expiration of the twelve months has authorized him to begin the payment of debts, and rendered him liable to be sued, pays a debt or has a judgment to go against him, no creditor can disturb that payment, or that judgment, by a subsequent notice of his claim. In this case it was *res adjudicata*—the sum due to Davies, and the assets which were to be applied to it. Any other application of these assets

would have been a *waste*. In the subsequent suit, therefore, against the administrators of Flewellen, for such waste, the only question was, what had he done with those assets? He would defend himself, or his representatives could defend him, only by showing that those assets had become unavailable without his fault, or perhaps by showing that they were still existing, and ready to be applied to the judgment. It was, therefore, illegal to admit evidence on the part of these defendants, concerning any other debts against Harris. Another reason for the same conclusion is, that the admission of such evidence, and the *pro rata* distribution of the assets among all the creditors of Harris, according to the charge of the Court, was simply administering the estate of Harris, not by his own administrators, but by those of Flewellen. It follows that the charge of the Court was erroneous as well as the admission of the notes in evidence.

[2.] We think there was no error, after the plaintiff had introduced part of a bill in evidence, in allowing the defendants to read other parts of the same bill relating to the same issue.

Judgment reversed.

NEEDHAM MASSEE, plaintiff in error, vs. DUDLEY SNEAD, defendant in error.

If the remedy by habeas corpus, is adequate, equity ought not to interfere.

In Equity, in Macon Superior Court. Tried before Judge WORRILL, at March Term, 1859.

Dudley Sneed filed this bill against Needham Massee, re-

turnable to the Superior Court of said county, March Term, 1859.

The bill alleges, that complainant, in Lee Superior Court, at September Term, 1857, under the Act of 1856, (*Pamph. p. 260,*) adopted John Needham Massee, son of Needham W. Massee; that both the father and mother of said child were dead at that time. That prior to said adoption, Robert Rives, of Randolph county, had obtained possession of said child; that after said adoption, Dudley Snead sued out a writ of *habeas corpus*, against said Robert Rives, to obtain the custody of said child, which was carried to the Supreme Court. That Rives moved to set aside the adoption of said child by Snead, in Lee Superior Court; that case was also carried to the Supreme Court; that both these cases came on to be heard, and that the Supreme Court decided that the custody of the child should have been awarded to Dudley Snead, and that the judgment of Judge ALLEN, refusing to set aside the order of adoption, should be affirmed.

The bill further alleged, that Rives, when the *habeas corpus* came on to be heard, after the decision of the Supreme Court, responded that he did not have the custody of said child.

The bill states, that Needham Massee, the grand-father of the child, without the consent of Snead, at September Term, 1858, of Macon Superior Court, and with a full knowledge of Snead's rights, procured an order of adoption, by which he was declared the adopted child of his grand-father. That said Massee has obtained possession of said child, and conceals him from the complainant, and complainant apprehends that he will carry him out of the State, &c.

The bill prays, that the order of adoption, by which the said child was declared to be the adopted child of said Massee, may be annulled and set aside, and that the said child may be brought before the Judge, at such time and place as he may appoint, and that the custody of the child may be delivered to complainant.

The bill also alleged, that Massee had applied to the Ordinary of Macon county, for letters of guardianship of the person and property of said child, and prays that he may be enjoined from proceeding with said application.

The bill was sanctioned, and defendant was directed to appear at the March Term, 1859, of Macon Superior Court, before the Chancellor, with said child, that he might then and there award the custody of said child to the person entitled thereto.

The defendant, Massee, appeared with the child at the March Term, 1859, of the Court, and objected to the Chancellor hearing and determining as to the custody of the said child, at the return Term of the bill, and without a jury, and also demurred to said bill for want of equity. The presiding Judge overruled the demurrer, and overruled defendant's objection to the hearing of the motion of complainant, to have the custody of said child delivered to him.

The defendant then showed cause against granting complainant's motion, the Act of the Legislature, assented to December 11th, 1858, (*Pamph. p. 177,*) and also a certificate of the Ordinary, that he had given bond and taken the oath as required by the second section of said Act, as guardian of said child. The Judge overruled the defendant's showing, and passed an order requiring the defendant to deliver the custody of said child to Dudley Snead, until the further order of the Court.

The defendant, Massee, excepted to each and all of said rulings and orders, and assigns the same as error.

HALL & GILES, for plaintiff in error.

McCAY & HAWKINS, *contra*.

By the Court.—BENNING J. delivering the opinion.

If there was no equity in the bill, it is manifest, that the

order of the Court below, was erroneous. And there was no equity in the bill, if there was a common law remedy, open to the complainant. And we think, that there was such a remedy, open to him.

The bill prays for three things: that the order by which, the child was declared to be the adopted child of Massee, may be annulled; that the child may be delivered to Snead, the complainant; that Massey's application for letters of guardianship of the person and property of the child, may be enjoined. This is the complainant's prayer. His right, if he has any, is merely to the custody of the child; if he has the right to the other two things, he has it only as a means to that end.

Can he assert his right to the custody of the child, as well, at law, as, in equity? We think so. For aught that we can see, the writ of *habeas corpus*, will fully answer his purpose. Suppose, on the return of that writ, Massee shows for cause of the detention of the child the order declaring the child his adopted child or an order appointing him guardian of the child's person and property, or both orders, will it not be the right of Snead to meet the orders, with any thing with which, it would be his right to meet them, in a case in equity? What objection or reply can he make to the orders, in equity? He can insist that they are *void*; that is all. Showing them merely voidable will not be enough; in that case, even equity will have to hold them good, until they are set aside, regularly, in the Court in which, they were rendered. But this reply, he could equally make to the return to the *habeas corpus*. Detention under a void judgment, is not a *legal* detention, and therefore, is no answer to a *habeas corpus*. In a word, if the order of adoption, granted, and the order of guardianship, apprehended by Snead, are things to bind him at law, they are equally things to bind him in equity—if they are things not to bind him, in equity, they are equally things not to bind him, at law. Why then should he go into equity? To annul orders? Can equity annul the judgment

of another Court? Equity acts on the parties to judgments by injunction, not on the Court rendering the judgments. But there is no need of any interference by equity with a void judgment. It is impossible that a void judgment can be in any body's way.

Moreover, as to the prayer for an injunction of the application for letters of guardianship, there was still another legal remedy—appearance and defence in the Court of Ordinary. Not, that we would be understood, as saying, that a failure to appear and defend there would render a grant of letters good, in a case in which, the Court had parted with all its power to grant such letters, by a previous grant of some kind.

Thus, then, it appears to us, that this is a simple case for the writ of *habeas corpus* and, therefore, that there was no equity in the bill, and, consequently, that the case was one in which, it was not proper for the Court to make the order which it did make—that being an order in furtherance of the suit.

Some other questions were argued in this case; questions of much importance, connected with the doctrine of adoption, and our legislation, public and private, on that subject; questions of doubt and difficulty.

In the view we take of the case, we think it best, not to decide these questions. They were well argued, it is true, but it is possible, that there is still light some where in reserve, to be shed upon them. We feel that we need all the light there is.

Judgment affirmed.

Adams vs. Mayor of Albany.

BENNETT ADAMS, plaintiff in error, vs. THE MAYOR OF THE
CITY OF ALBANY, defendant in error.

- [1.] A clause in the charter of the city of Albany, conferring power in general terms, to pass all by-laws, &c., not inconsistent with the Constitution and laws of the State, does not confer the power to pass an ordinance making it a penal offence to sell spirits in quantities of a quart or more, to be drank on the premises where sold, this being inconsistent with the State law on the same subject.
- [2.] To confer power on a Judge to *try* offences, *creates* no offence. He must try according to *law*, and where there is no law there is no offence.

Certiorari, in Dougherty Superior Court. Decision by
Judge ALLEN, at chambers.

The facts of this case are as follows:

Bennett Adams was brought up before the Mayor of the city of Albany, (the honorable Richard F. Lyon) on a charge of selling spirituous liquors in quantities over one quart and permitting the same to be drank in his house. Defendant objected to being tried by the Mayor alone, claiming and insisting that he was entitled, under the charter of said city, to be tried by the Mayor and Council. This objection was overruled, and the trial proceeded before the Mayor alone.

It appeared from the evidence that Adams was the owner of a wagon-yard in said city, upon which was a house with two rooms, one of which he used for a grocery store, and the other was for the accommodation of the wagoners; there was no door or other opening between the rooms; that wagoners, camping in the yard, would frequently purchase a quart of liquor and carry it into the room occupied by them, and there drink it, and that other persons had purchased the same quantity and went into the wagoners' room and drank it.

Upon this proof, defendant moved to quash the proceeding, upon the ground that the ordinance, for the violation of

which he was being tried, providing that no liquor over a quart shall be sold and drank in the vendor's house, was a violation of a private vested right, and repugnant to the statutes of the State and therefore void. The motion to quash was overruled and defendant fined twenty-five dollars. To which rulings and judgment defendant excepted, and applied to the honorable ALEXANDER A. ALLEN, Judge of the Superior Court, for a writ of certiorari to correct and reverse said judgment. The Judge refused the application and defendant excepted and assigns error, &c.

STROZIER & SMITH, for plaintiff in error.

GREENLEE BUTLER, *contra*.

By the Court—STEPHENS, J. delivering the opinion.

[1.] Was the ordinance a valid one? The authority for it must be derived from the charter of the city, either the original or amended charter. The only clause in the old charter, claimed as conferring the power to pass this ordinance, is the one conferring power in general terms, to pass all by-laws, ordinances, &c., not inconsistent with the Constitution and State laws. But this ordinance *is* inconsistent with a State law. A statute declares in effect that every citizen may sell liquor to white people in quantities of a quart or more, with but one single restriction, and that is if he sells less than a gallon he must first take an oath not to sell to negroes. This is the *result of the statute*. It is not a case where State law is silent. The State has *spoken*. The result is a clear declaration by State law, that the liquor may be sold to be drank anywhere. The city speaks, and says it *shall not* be sold to be drank on the premises. The one says it may, the other says it shall not. The two cannot stand together, and that is the test of *inconsistency*.

Prescott and Pace vs. Jones and Peavy.

[2.] Then does the amended charter confer the power to pass this ordinance? A careful examination of it shows that, with the single exception of taxes, it confers no legislative power whatever. It *does* confer *judicial* power, by empowering the Mayor to *try* certain classes of offences. It makes no laws against offences nor does it empower anybody else to make such laws. It empowers the Mayor to *try* offences, but he must try them by *law*. Where there is no law, there is no offence. The difficulty under which the judgment in this case labored, was the want, not of a Judge to render it, but of a law to authorize it. We think there was a capital Judge, but no law.

Judgment reversed.

JOHN DOE, ex dem., PATRICK PRESCOTT and JAMES PACE, plaintiffs in error, vs. RICHARD ROE, casual ejector, and HARRELL B. JONES and MICHAEL S. PEAVY, defendants in error.

[1.] Marriage gives to the husband, such a title to the wife's land, that he may after her death, although he has never reduced it into his possession, sue for it, and recover it, without having administered on her estate.

[2.] If, in ejectment, there is a demise from A. and a demise from B. and the evidence brings the title into A. and then shows a deed from A. to B. there ought not to be a nonsuit, whether the deed from A. to B., be void or not.

Ejectment and nonsuit, in Dooly Superior Court. Before Judge LAMAR, April, 1859.

Upon the trial of this case, plaintiff offered and read in evidence a copy grant from the State, for the premises in dis-

pute, to Patrick Prescott, dated 23d March, 1824; then a certified copy from the records of the Inferior Court of Richmond county, proving the marriage of said Patrick, to Sarah Bush. Marriage solemnized 12th Nov., 1818; plaintiff then proved that Prescott died in 1824 or 1825, in the city of Augusta, Georgia, leaving no child or children living at his death, but his widow, the said Sarah surviving him. He further proved the marriage of said Sarah Prescott, widow, to James Pace; said marriage solemnized 4th September, 1827, and that said Sarah died in 1846, and before the commencement of this suit. Plaintiff further offered and read in evidence a warranty deed, of the premises in dispute, from James Pace to Stephen T. Heard, one of plaintiff's lessors, dated 15th April, 1852.

It was admitted by counsel that the premises in dispute, were wild vacant lands in 1846, at the time of Mrs. Pace's death, and no one in the possession or actual occupation of them, nor had been, but that the defendant was in possession, holding adversely at the time the deed was executed by James Pace to Stephen T. Heard, 15th April, 1852. Plaintiff proved the *locus* and possession thereof by defendants and closed.

Defendant introduced in evidence a deed for the premises in dispute from James R. Jones, executor of James Jones, to Samuel Rutherford, dated ———— and a deed from Rutherford to the tenants in possession, dated in 1847, and thereupon moved for a nonsuit, upon the ground that Sarah Pace and Patrick Prescott, being both dead before the commencement of this suit and the defendants being in possession holding adversely at the time the deed was executed by Pace to Heard, no recovery could be had.

The Court sustained the motion, and ordered a nonsuit. Whereupon, plaintiff excepted and assigned error.

STUBBS & HILL, HINES & HOBBS, for plaintiff in error.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right, in granting the nonsuit?

Two grounds for the nonsuit, were insisted on. The first was, that Pace had not reduced the land to possession, when his wife died, and, that he had not administered on her estate since her death.

But we think, that an administration by him, on her estate, was not necessary in order to make the land his. We think, that the marriage made the land, his. The language of the Act of 1789, on the subject, is; “and, in cases of intermarriage since the 22d day of February, 1785, the real estate belonging to the wife, shall become vested in, and pass to the husband, in the same manner as personal property, doth.” *Pr. Dig.* 225. By “*personal property*,” we understand, personal property *in possession*, and not, choses in action; and, as to personal property in possession, “the husband hath therein, an immediate and absolute property, devolved to him by the marriage, not only potentially, but in fact, which never can again revest in the wife or her representative?” 2 *Black. Com.* 435.

Consequently, by this Act of 1789, Pace, the husband, had in this land, an immediate and absolute property devolved to him, by the marriage, not potentially, but, in fact.

[1.] We think, therefore, that the first ground for the nonsuit was insufficient.

The second ground was, that even if Pace had the title, yet that the land was held adversely to him, when he made the deed to Heard, and, therefore, that that deed was void by the Act of 32 *Henry VIII*, entitled “the bill of bracerie and buying of titles.” But what of that? There was a demise in the name of Pace himself, as well as, one in the name of Heard. And Pace’s deed to Heard, was void, or, it was not; if it was void it had no effect, and the title still remained in

Pace, if it was not void it had effect and conveyed the title into Heard. But if either Heard or Pace had the title, the plaintiff was entitled to recover, for he had a demise from both Heard and Pace.

It is unnecessary, then to say, whether it was or was not true, that the deed from Pace to Heard was void, by the Act of *Henry the VIII.*

[2.] We think, then, that the second ground for the nonsuit, was also insufficient.

The result therefore, is, that, in our opinion, the Court was *not* right in granting the nonsuit.

Judgment reversed.

WILLIAM NEWSOM, executor, plaintiff in error, vs. JOHN JACKSON, defendant in error.

[1.] An action of deceit, being necessary in form *ex delicto*, dies with the defendant.

[2.] Whether it dies with the plaintiff? Query.

Case, and motion to make parties, in Baker Superior Court. Decision by Judge ALLEN, May Term, 1859.

Jackson brought his action on the case against Cæsar A. Savage for deceit. Pending the action and before trial, Savage died, and Newsom his executor was served with *scire facias*, to show cause why he should not be made a party defendant in the place of his testator, and the cause proceed. Newsom appeared and moved to dismiss the action on the ground, that the suit had abated by the death of the defend-

Newsom, ex'or. vs. Jackson.

ant, and the cause of action, did not survive. The Court overruled the motion, and Newsom excepted.

LYON, IRVIN & BUTLER, for plaintiff in error.

MORGAN, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] This was an action by Jackson against Savage for *deceit*, in fraudulently inducing Jackson to give credit to another, he, Savage, knowing that other to be unworthy of such credit. Savage being dead, does the action survive in the same or in any other form against his executor? The common law rule is, *actio personalis moritur cum persona*; but still the question is—what is included under the head of *actio personalis*? The most satisfactory answer which I have been able to find, is given by Judge TUCKER, in his *Commentaries*, 3d book, page 223, as being the result of all the cases. He says, if the cause of action *can* be maintained in form *ex contractu*, it survives, but if it is *necessarily* in form *ex delicto*, it dies with the death of either party. Can this cause of action be maintained in form *ex contractu*? To put it in that form, would be to claim an implied promise from Savage, that he would make his representations good; that is a guaranty. But this would be obnoxious to the statute of frauds, as being a promise to answer for the debt of another and not in writing. By the common law rule then, this cause of action not being maintainable except in form *ex delicto*, dies with the death of either party. The only alteration made in this common law rule, so far as I am aware, is by 4 Edward III, chap. 7th. This statute does not materially change the rule, for by a very liberal construction it has been made to save all actions for injuries to *personal property*, whereby the property is rendered less beneficial to the executor. It may be said this was an injury to the goods

which Jackson sold, whereby he lost them. Without discussing that question, it is enough to say that the saving of the statute is only *in favor of* the representative of the *injured* party; it does not save the action *against* the representative of him who does the injury. There may be little reason for the difference, but so is the statute, and so has it been uniformly construed. That statute, therefore, does not save this case. It was suggested in the argument that the action could be maintained in form *ex contractu* by an amendment, alleging that the goods sold were for the benefit and went into possession and enjoyment of Savage, and thereupon claiming his implied *assumpsit* to pay for that which he had got and enjoyed of another's property. It is enough to say that *this* would be a new *cause* of action, and not simply a new form for the same cause. If Jackson ever had such a cause of action as that, he has not lost it. The difficulty is, he has never brought it. Our own statute was invoked in this connection, saving actions from abatement by the death of either party, where the cause of action would survive in the same or any other form. This statute does not affect in the slightest degree the causes of action which survive or die, nor does it put one cause of action in the shoes of another. It only saves the action from abatement where the *same cause* of action would survive (as the law then stood,) either in the same or some other *form*. The same cause of action might be brought in trover or in detinue; or again in debt or in assumpsit. There are instances of different forms for the same cause of action. But the deceit pending, and the assumpsit proposed to be introduced by way of amendment, are founded on essentially different facts, and are therefore essentially different causes of action.

[2.] The rule which we are obliged to apply in this case, may not be a very reasonable one, but it is a very old and well established one. We think the action died with the defendant.

Judgment reversed.

NATHANIEL SLEDGE, survivor, plaintiff in error, vs. PETER McLAREN, defendant in error.

The defendant in an attachment, has no right of action against the plaintiff in the attachment, for wrongfully suing out the attachment, unless that was done, with malice and without probable cause; and, in such action, when brought, the *onus* is upon him, the plaintiff in it, to show, that the attachment was taken out, with malice, and, without probable cause.

Case, in Muscogee Superior Court. Tried before Judge WORRILL, at May Term, 1859.

This was an action on the case, brought originally by Birdsong & Sledge, against Peter McLaren, for maliciously and without probable cause, suing out an attachment against plaintiffs, whereby their business as merchants was greatly damaged—in fact broken up. Damages laid at ten thousand dollars. Pending suit Birdsong died, and the action proceeded in the name of Sledge, the surviving partner.

This is the second time this case has been before this Court, and the facts will be found fully reported in the *24th vol. Geo. Rep.*

Upon the former trial, the jury found for the plaintiffs \$3,250 00, and upon a writ of error to this Court, the judgment was reversed, and the case remanded for a new trial.

At the May Term, 1859, of Muscogee Superior Court, the case coming up again for trial, the parties submitted their testimony, upon which no point was made in the Court below, or in this Court.

The Court below charged the jury, amongst other things, "that the plaintiff must prove a want of probable cause, or he cannot recover in this action, the foundation of which is malice, and without proof of malice plaintiff cannot recover. That plaintiff must prove a want of probable cause before defendant can be required to show that there was probable cause, and the want of probable cause is affirmative proof to be made out by the plaintiff." To which charge counsel for plaintiff excepted.

The jury found for the plaintiff one thousand dollars, and plaintiff filed his bill of exceptions, and assigned as error the charge of the Court above given.

WILLIAM DOUGHERTY, for plaintiff in error.

JOHNSON & SLOAN; and MOSES, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the charge of the Court right?

The charge asserts two propositions; one, that no right of action accrued to the plaintiff, against the defendant, unless the attachment of the defendant, against the plaintiff (and his deceased partner,) was taken out by the defendant, *with malice and without probable cause*; the other, that the *onus* of proving the attachment to have been so taken out with malice and without probable cause, *was on the plaintiff*.

Were these propositions true?

We think that they were.

A rule of the common law, forbids one man to sue another, for having sued him, unless the suit of the latter, was with malice, and without probable cause. This rule extends, not merely to cases in which, the suit was on the criminal side of the Court, but also, to cases in which, the suit was on the civil side of the Court; or, to cases in which, the suit was the taking out of a commission in bankruptcy; the setting up of a claim to goods; the suing out of bail process, &c. See 2 *Green. Ev. sec.* 449.

And it is another rule of the common law, that, when one man sues another, for having sued him, the *onus* is on him to show these facts—to show, that the suit against him, was with malice and without probable cause. It is well settled that this is the rule of the common law. *Id. sec.* 454.

Is there, in the legislation of this State, any thing that repeals these rules of the common law? It is argued, for the

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plaintiff in error, that there is—it is argued, that a part of the Attachment Act of 1799, repeals them; namely, the part which says, that the magistrate issuing the attachment, “shall take bond and security of the party for whom, the same may be granted, in double the sum to be attached, payable to the defendant, for satisfying and paying all costs which may be incurred by the defendant, in case the plaintiff suing out such attachment, shall discontinue, or be cast in his suit, *and also, all damages which may be recovered against the said plaintiff, for suing out the same.*” *Cobb Dig.* 70. The question turns on the words which I have put in italics. The plaintiff is to give bond and security, to the defendant, to pay him all damages that he may recover of the plaintiff, for the plaintiff’s suing out of the attachment; that is to say, if the defendant in the attachment, shall sue the plaintiff in the attachment, for having sued out the attachment, and shall, in that suit, recover from him, any damages, this bond shall be a security for the payment of those damages. That is all. These words merely give a security for such damages as, the defendant in the attachment, may recover of the plaintiff in the attachment, in a suit brought against the plaintiff, for wrongfully suing out the attachment. They do not undertake to regulate that suit, at all; they do not say, what shall, or shall not, be the prerequisites of that suit; or, on which party in that suit, shall be the *onus* of proving any particular fact or facts. These things, they leave as they were before the passage of the Act. And before the passage of the Act, these things were subject to the common law rules aforesaid.

Then, there being nothing in this Act of 1799, to repeal the common law rules, the charge of the Court was right.

Indeed, if the charge had been wrong, that would not have been a ground for a new trial, because the verdict, notwithstanding the charge was for the plaintiff, and for \$1,000. Therefore, one of two things, must be true, either the jury disregarded the charge, or, regarding it, they concluded, that

the attachment was taken out with malice and without probable. Either being true, the charge did not hurt the plaintiff. And therefore, the charge does not entitle him to a new trial, even if the charge was wrong.

Judgment affirmed.

JOHN H. GILMORE, plaintiff in error, vs. MARY A. JOHNSON,
defendant in error.

- [1.] The verdict in this case held to be supported by the evidence.
- [2.] Where husband and wife are parties on one side to an agreement for the benefit of the wife and children, and they have become entitled by an advantageous part performance by the other side, to a full performance for the benefit of the wife and children, the husband cannot defeat the rights of his wife and children by a release.
- [3.] It is no error to allow a complainant to give evidence in mere diminution of the defendant's proof, although the bill contains no obligation covering the evidence so introduced by complainant.
- [4.] Where a complainant places a *fi. fa.* in the hands of defendant to be collected and the money used for a particular purpose, proof that the Sheriff collected the money affords a presumption that the defendant (who is legal owner of the *fi. fa.* by transfer) has got the money—because it places the money where he may easily get it, and where, if he does not get it, the failure is his own fault.
- [5.] A bill by a wife, alleging that her husband, who was deeply in debt, had negroes, derived from her by marriage, going to sale under executions, and alleging an agreement under these circumstances on the part of her and her husband on the one side, and her brother on the other, that her brother should buy the negroes at such sale, and after reimbursing himself for his outlay, in pursuance of the agreement, should then convey the negroes to a trustee for the wife and children; and alleging that the brother has bought the negroes at prices which were greatly reduced by his making it known that he was buying for the benefit of the wife and children; and alleging further that he has reimbursed all his outlay made in pursuance of the agreement; and asking a full and specific performance of that agreement on his part—is a good bill.

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[6.] And in such case the complainant is entitled to any overplus of *hire*, after allowing the brother all proper reimbursements for his outlay in pursuance of the agreement.

In Equity, in Lee Superior Court. Tried before Judge ALLEN, March Term, 1859.

This was a bill in equity, filed by Mrs. Mary A. Johnson, by her next friend, against John H. Gilmore, charging substantially that her husband, John S. Johnson, in 1844, was largely indebted, and executions about to be levied on all his property; and that knowing that the property would be sold at a great sacrifice, complainant and her husband applied to John H. Gilmore, her brother, and requested him to attend the Sheriff's sale, and become the purchaser of the property; and, after reimbursing himself out of the property, to hold the remainder in trust, for complainant and her children; that Gilmore consented to this arrangement, attended the Sheriff's sale, announced to the bidders that he was buying the property for the benefit of complainant and her children, and he thereby was enabled to buy the land worth \$1,000 for \$20, and negroes worth several hundred dollars for \$50, and thus became the purchaser of all the property for a very small and inconsiderable amount. That to enable Gilmore to pay off said debts, John S. Johnson, the husband of complainant, placed in his hands other assets, from which he realized thirty-two hundred dollars. The bill further charged, that Gilmore had sold the land for upwards of \$1,000, which, with the assets realized as above, was sufficient to reimburse him the amount paid out by him. That Gilmore had used the negroes since 1845, and that they were now in his possession, and of great value; that he had allowed complainant to use a portion of them, but refused to acknowledge the trust as to the balance. The bill further charged, that Gilmore had procured a release from John S. Johnson, of all his claims in this behalf, but this was without the knowledge or consent of complain-

ant, and in fraud of her rights. Complainant offered to account for any balance due Gilmore on the purchase, to allow him full compensation for his trouble and expense, and to do full equity in this behalf.

The prayer was for an account, and a decree compelling Gilmore to convey the property to a trustee, for Mrs. Johnson and her children.

To this bill defendant demurred

1st. Because John S. Johnson, the husband, was not made a party.

2d. For want of equity.

The Court below overruled the demurrer and that decision was excepted to, and the case brought to the Supreme Court, and that Court reversed the judgment on the first ground. See 14 *Geo. Rep.*, 683.

The complainant amended her bill, making John S. Johnson, her husband, a party, who answered, and admitted all the material allegations of the bill.

John H. Gilmore answered, admitting the facts stated in the bill as to Johnson's indebtedness, and that his sister, Mrs. Johnson, did apply to him to assist her, but states that he only told her "that he would never let her suffer as long as he had anything himself; that he did not know that he could do what she asked of him, but that he would do so if he could;" and this is all the agreement or arrangement made by defendant, in relation to the purchase of said property; admits that he purchased the property at the time and for the sums stated, but states that he has never been repaid or reimbursed the amount paid by him on account of Johnson, and the executions and debts which he paid or got control of.

The case being submitted to the jury, upon the bill, answers, proofs and charge of the Court, they found for complainant the negroes mentioned in the bill, with their increase, except one sold by defendant, and for which they find that he pay \$800, with interest from the time of sale.

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Whereupon, defendant moved for a new trial on the following grounds:

1st. Because the verdict is contrary to evidence;

2d. Because the verdict is contrary to law;

3d. Because the jury found contrary to equity;

4th. Because the jury found contrary to the charge of the Court, in this, that the Court charged, "That the evidence must show that there was such a contract made by the parties as that charged in complainant's bill, and if they believed from the evidence that such a contract was made, then Gilmore, the defendant, was entitled to have the use of the property until reimbursed the amount paid out by him, principal and interest, and also a reasonable compensation for his trouble, and all amounts advanced by him for the education of complainant's children, and for her and their support and maintenance."

The Court overruled the motion and refused to grant a new trial, and defendant excepted, and in addition to error assigned for refusing the motion for a new trial, he assigns as error:

1st. That the Court erred in admitting the testimony of Philip P. Monroe, and other witnesses, on the part of complainant, going to show or prove that John H. Gilmore and his family, while complainant kept hotel in Starksville, frequently stopped there, &c. This was intended as a set-off to defendant's demand for provisions furnished complainant. The defendant objecting to its admission as illegal and irrelevant.

2d. That the Court erred in admitting the testimony of David A. Vason, Esq., that he had seen the execution (which was not before the Court or in evidence) of John S. Johnson against the administrators of John Johnson, since its transfer to defendant, and that it was satisfied as appeared from the receipt of William Jānes, the former Sheriff of Lee County, endorsed on the *fi. fa.*, defendant objecting to the admission of the same.

3d. Because the Court erred in charging the jury, "that if the proof showed that such a contract was made as that set up in complainant's bill, and was partly executed by a sale of the property, it was an executed contract that they should enforce."

4th. That the Court erred in charging the jury, "that if they should be satisfied that complainant had made out her case, she was entitled to recover the property with hire."

HINES HOLT; and R. F. LYON, for plaintiff in error.

WARREN & WARREN, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

This was a motion by the defendant for a new trial on several grounds, all of which resolve themselves into the single one, that the verdict is not supported by the evidence. We think the verdict is supported, and well supported by the evidence. It was argued that the agreement which the complainant seeks to have specifically performed, was not sufficiently proven. The defendant in his answer, while denying it in some places, in another place substantially admits it, for he says his sister asked him to do just what the bill alleges he agreed to do, and that he told her he would do so *if he could*, and then he went on and bought the property, holding off other bidders by telling them he was buying it for the benefit of his sister and her children; thus getting what would be an unconscionable advantage, if he is to be allowed to pocket it. Can it be supposed that she and her husband would have stood by and allowed their property to be thus sacrificed, *if he had not made them believe* that he consented to the proposition?—that he thought he *could* do it, and had actually undertaken it? But besides this, long afterwards his sister reminded him of the agreement, and he did not deny it. The proof of the agreement was satisfactory. It

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was also argued that there was no proof that the husband was a party to the agreement, as alleged in the bill. Here the argument is equally unfortunate, for the circumstantial proof is very strong that the husband *knew* of it, and *sanctioned* it, and this is all that was necessary. If he sanctioned an agreement made by his wife, he made it his own. That he did know of it and sanctioned it, is most strongly shown by the fact that he allowed the defendant to buy his property at prices which he could have prevented by only speaking, and which were ruinous to him *without the agreement*. Suppose him to know of the agreement and sanction it, and his conduct is all consistent and rational, otherwise it is foolishly absurd. It is argued, also, that the verdict is against that part of the charge which instructed the jury that they could not give the relief sought unless the evidence showed that Gilmore had been reimbursed the principal and interest paid out by him on account of the agreement, and also such sums as he had advanced for the education of the children, and the maintenance of them and their mother, together with a reasonable compensation for his services. The jury found by their verdict that he had been reimbursed for all these things, and we think the evidence was ample to satisfy them that whether or not he actually had been reimbursed, he at least had had ample means and ample time to have made the means available for that purpose. With his opportunities, he could have failed of being reimbursed only by his own gross negligence. He *ought* to have got full reimbursement, and equity considers that as having been done which ought to have been done. On any other principle he could forever defeat the complainant's relief, and continue to hold her property on no better plea than that he was making a very bad use of it. But the defendant sets up a *release* from the husband, executed after the defendant had partly executed the agreement, and at a time when he would have pocketed an unconscionable advantage by being allowed to retire from its full performance. It was argued that the verdict

was against the evidence, because this release, whatever other proof there was, destroyed the complainant's right to relief. Upon this release I remark, first, that it shows the defendant felt he had need of one; and, second, it implies that the husband was a party to the agreement, thus adding proof upon the points as to the existence of the agreement, and the husband's sanction of it. But it is utterly powerless to affect rights which the wife and children had acquired under the agreement. When by a part performance, disadvantageous to them, the husband and wife had become entitled to a full performance for the benefit of the wife and children, the matter passed from under the control of the husband just as effectually as if he had made a settlement upon Gilmore in trust for his wife and children. Such a settlement by him for their benefit would certainly not be revocable by him, nor could he release Gilmore from his obligation to perform the trust. In the one case it is a settlement which would be enforced because written, in the other a settlement which must be enforced because partly performed. The part performance stands in place of the writing. When the husband once raises a trust in favor of his wife and children, he cannot revoke it, although his agreement remains under his control (so far as they are concerned) until the trust is raised. An agreement which is wholly executory he may abandon or release when he pleases, but one wholly executed, or partly executed, so as to call for a full execution, vests in them rights which he cannot release nor trade off.

But there are assignments of error here besides the refusal to grant a new trial.

1st. The first is, that the Court erred in admitting the testimony of Philip P. Munroe, to show that defendant and family had frequently stayed with complainant while she kept hotel. The object of this testimony was to rebut a claim which defendant, in his answer, asked to have allowed him for supplies and provisions furnished to complainant and her children. The proof was rebutting in its character, and

was, we think, properly allowed. The objection made to it is that it proves a claim not set up in the bill—that there is no allegation to cover it. It is not a claim in which relief is sought, or a recovery asked; if it were, the objection would be good. It is only in abatement of the defendant's proof, just as it would be in abatement, after he had shown provisions furnished, to show that half of them, or some part of them had been returned to him. It goes in diminution of his proof.

2d. We think the testimony of Mr. Vason, in relation to the entry of satisfaction on the *fi. fa.*, was properly admitted. The objection to it was not that it was secondary evidence, for the *fi. fa.* was lost; but it was, that the entry of satisfaction by the Sheriff did not show that the legal owner (the defendant in this bill) had got the money. We think it does afford a presumption that he got it, because it places the money where he might *easily* have got it, and where, indeed, if he had not got it, the failure was his own fault.

3d. The third assignment of error is simply a general demurrer to the bill, and as that was overruled at a former Term of this Court, we simply refer to that decision now as authority for holding the same way again, and also as *res adjudicata*.

4th. We think there was no error in the charge in relation to hire. The whole charge, taken together, was simply this: the defendant must account for reasonable hire, and must also be allowed his divers disbursements, and that if after allowing all of them, there was still an overplus of hire, the jury ought to find such overplus. This is the fair construction of the charge, as a whole, and it was right. Besides the jury did not find any hire, and, therefore, the charge did not hurt the defendant. We are well satisfied with the verdict, and find no error in the record.

Judgment affirmed.

TILMAN COOK, plaintiff in error, vs. **THE STATE OF GEORGIA**,
defendant in error.

A new trial will be granted, if the evidence is not sufficient to justify the verdict

Indictment for hog stealing, in Houston Superior Court.
Tried before Hon. PETER E. LOVE, presiding, at April Term,
1859.

Tilman Cook, the plaintiff in error, was indicted for stealing four hogs, the property of Daniel Adams. He was found guilty of stealing one hog. Whereupon, he moved for a new trial on the grounds:

1st. Because the verdict is decidedly and strongly against the weight of evidence.

2d. Because the evidence showed that the defendant, as overseer of Pulaski S. Holt, and in the presence of the prosecutor's son, had the hog, of which he was convicted of stealing, driven into the pen with the hogs of his employer, Holt, to be fattened, and claimed said hog as the property of said Holt, and with no intent to steal the same.

3d. Because the verdict is contrary to law, and the charge of the Court.

The Court refused to grant a new trial, and defendant excepted.

JNO. M. GILES; PRINGLE & KING, for plaintiff in error.

Sol. Gen. MONTFORT, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right, in refusing the motion for a new trial?

All the grounds of the motion, may be reduced to this one, that the evidence was not sufficient, to authorize the verdict. Was this one good?

Cook set up a claim to the hog. If that claim was a real, and not a pretended, claim, he was not guilty of hog stealing. This may be assumed.

The question then narrows itself, to this; does the evidence show, that his claim was only a pretended, and not a real, claim? We think, it shows, that his claim was a real one.

If his claim was for another, and not for himself, that is a fact which is almost insuperable, to show, that his claim was real. Disinterested stealing is not a supposable case. Perhaps, it is not an impossible case. But see *2 Leach*, 1089.

The evidence is strong to show, that his claim was for another, really for another, and not for himself. Let us see.

He *said* that the hog was Col. Pulaski S. Holt's.

His conduct answered to his words; he *treated* the hog as Holt's. He put the hog in Holt's hog-pen, with Holt's fattening hogs, and, of course, fed him as Holt's hog, with Holt's corn. And that he was doing this, Holt knew, or was likely to know, for his negroes must have known it, and the pen was at "the place where, they were accustomed to feed and fatten hogs, previously;" a place, "with regard to water and the crib, very appropriate to a hog-pen;" not some out of the way, secret place; a place, therefore, which Holt, with perhaps other members of his family, would be likely to visit often; a place, indeed, of easy access to the neighbors and all the curious. Then, there is not a circumstance in the evidence, to show that he had any purpose to convert the hog to his own use. Not one. All this appears from the evidence.

Not only did he say both by word and act, that the hog was Holt's, but Holt himself thought, that the hog was. He so swore. Even Adams, the owner of the hog, and the prosecutor of Cook, said, "the mark looked like Holt's, and he wanted him to see it." This Holt swore.

Now is not all this enough, to show, that Cook was really claiming the hog, for Col. Holt, and not for himself? We think it is. If so, then that is a fact almost insuperable, to

show, that Cook, in setting up a claim to the hog, was acting with sincerity, and not with a mere pretense to hide a theft.

Is there any thing in the evidence to enable us to get over this great fact. Nothing, we think. It is true, that the evidence shows, that the hog was in the mark of Adams, (which was an overbit in each ear, and an underslope in each ear,) and, that Cook insisted, that such mark was made by the buzzards, when the hog, was a very young pig; and, that, in that, he was probably wrong—(although it was in proof that buzzards do mutilate the ears of young pigs, and a buzzard's bill is not ill adapted to making an "overbit," and an "underslope" causing little change in the ears' appearance;) still, all this is perfectly consistent, with innocence—with the idea, that Col. Holt had a pig mutilated about the ears, by the buzzards, and that Cook took this hog to be that pig.

And if this fact is against Cook, another, in addition to those already mentioned, is in his favor. Cook had been the overseer of Col. Holt for "twelve or thirteen years." He had the exclusive possession of the plantation, and all the property upon it—Col. Holt residing in Macon. Of necessity, therefore, he was for twelve years largely trusted by Col. Holt, and during all that time had both opportunity and temptation, to steal from Col. Holt, yet what does Col. Holt say of him? "His general character is irreproachable." This is what Col. Holt says of him; and Col. Holt's chance for knowing his character, at least, his character for honesty, was, probably, far better, than any other living man's.

Other witnesses give to Cook, similar testimonials; not one impeaches his character.

We think, then, that the evidence was not sufficient to justify the verdict.

Judgment reversed.

Day et al., vs. Huggins.

JOHN DOE, ex dem., **CHARLES DAY**, and others, plaintiff in error, vs. **JOHN HUGGINS**, tenant in possession, defendant in error.

The defendant in ejectment. proved the existence, and loss or destruction, of a grant ; he also proved that a copy-grant was not to be had from the Secretary of State's office.

Held, That on this foundation, a certificate from the Executive Department, that the grant had issued, was admissible.

Ejectment, in Lee Superior Court. Tried before Judge **ALLEN**, April Term, 1859.

This was an ejectment by John Doe, upon the demises of Charles Day, and T. R. Bloom, against Huggins, tenant in possession, for lot of land No. 236, in the third district of Lee county.

Plaintiff read in evidence a grant from the State, dated 4th January, 1847; proved the *locus* and possession of defendant at the commencement of the suit, and closed.

Defendant proved by *Green B. Mayo*, that he, witness, had had in his possession an original grant from the State to Jonathan Colquitt for the land in dispute, dated 13th June, 1827, and a deed from Colquitt to one ——— Dawson, and that he, witness, had purchased said lot from a person who represented himself to be the agent of Dawson; that said grant was lost or destroyed; that he had applied to the Secretary of State, for a copy grant, and could not obtain one; that he saw an entry on the books of the Executive Department, showing that said lot was drawn by Jonathan Colquitt, and granted to him.

Cross-Examined.—There was also a subsequent entry, showing that said lot had also been granted to Charles Day.

Defendant then introduced *W. C. Gill*, who testified: That in 1854, a man came to his house offering to sell land, and had a grant; witness took it to be an original grant to lot No.

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236; that he examined the grant and deeds pretty closely; as appeared from said grant, Jonathan Colquitt was the grantee, and it was dated sometime in 1829; that all the entries on said grant appeared to be regular; was signed, George R. Gilmer, had the "bees-wax" or seal of the State of Georgia attached. Witness had not seen said grant since the man who had it, left his house.

Cross-Examined.—Has seen "*bogus*" grants, but had not up to that time seen any; the grant was old and somewhat worn; don't recollect about whether the paper was smooth or rough; *bogus grants*, that witness has seen, had a blotched, spotted appearance; this grant looked old and greasy, and witness took it to be an original, genuine grant.

Defendant then read in evidence a certificate from *M. D. McComb*, Secretary of the Executive Department, to the effect that upon examination of the numerical land books of file in that department, it appeared that lot of land No. 236, was drawn by Jonathan Colquitt of Lacey's district, Oglethorpe county, and appears to have been granted to him 13th June, 1827, and that said book also shows that another grant was issued for the same lot of land to Charles Day, 4th January, 1847, as a reverted lot.

Here defendant closed.

Plaintiff then moved to exclude said certificate as incompetent to show that said lot had even been granted to Jonathan Colquitt, on the ground that it was not the best and highest evidence which could be produced of that fact. The Court refused the motion to exclude the certificate, and plaintiff excepted.

Plaintiff then proved that Troup was elected Governor in 1825; his term was two years; Forsyth succeeded him in 1827, and Gilmer succeeded Forsyth. That if Gilmer went into office at the regular time, his Term commenced in November, 1829.

Plaintiff then requested the Court to charge the jury, "that

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in the absence of the original grant and copy, the next best evidence was the certificates or testimony of the heads of the departments of the State, that the grant had issued. The Court refused so to charge, and plaintiff excepted.

Plaintiff requested the Court to charge "that the jury must be satisfied that the grant fees had been paid to the State, and that the certificate of the State Treasurer was the highest evidence of that fact, in the absence of the grant, and that it must affirmatively appear that the grant fees had been paid; and that although the grant may have issued, yet if the fees had not been paid, the title of the State was not divested.

The Court refused to give this charge as requested, but charged, "that the certificate of the Treasurer, was not the only evidence of the payment of the grant fees."

To which charge and refusal to charge, plaintiff excepted.

The jury found for the defendant, and plaintiff moved for a new trial, upon the following grounds:

1st. Because the jury found contrary to, and without evidence.

2d. Because the verdict is contrary to law.

3d. Because the Court erred in admitting in evidence the certificate of the Secretary of the Executive Department.

4th. Because the Court erred in charging and refusing to charge as above stated.

The Court overruled the motion for a new trial and plaintiff excepted.

LYON & IRVIN, for plaintiff in error.

McCAY & HAWKINS, *contra*.

By the Court.—BENNING J. delivering the opinion.

The first and second exceptions involve the same ques-

tions, viz: the question, whether the certificate from the Executive Department, was proper evidence.

The object of the certificate was to prove a grant. Proof of the existence, and loss or destruction, of the grant, was before the Court; also, proof, that a copy of the grant was not to be had from the Secretary of State's office. Now, on such a foundation as this, was the certificate admissible? We think so. It was said, that there was better evidence than this certificate, viz: the testimony of the heads of the Executive Department of the State." But first, there is nothing to show, what they would swear, and the presumption, probably, is, that they would only swear to what appears on their books, and the Acts of 1819, and 1830, say, that certificates of what is on their books, shall be admissible as evidence. *Pr. Dig.* 215, 220. Secondly, it is a question, whether there are any degrees at all, in secondary evidence, but if there are, nothing appears on the face of this certificate, or, in the facts of the case, itself, to suggest, that any better or other evidence exists of the grant, than this certificate; and when that is so, with respect to a piece of secondary evidence offered, it seems agreed by all, that the piece is to be received, the Court not being bound in such a case, to presume, that secondary evidence of any higher degree, exists. See 1 *Green. Ev. sec.* 84, *note* 2.

We think that there is nothing in the first and second exceptions.

No authority was read to show the proposition true, that it must affirmatively appear, "that the grant fees had been paid; and, that, although, the grant may have issued, yet, if the fees had not been paid, the title of the State, was not divested," and, without authority, we are not prepared to sanction the proposition.

The remaining exception is, that the verdict was not supported by the evidence. As to this, all we have to say, is,

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that there was, we think, sufficient evidence to authorize the verdict.

Judgment affirmed.

CYRUS A. ROYSTON and WIFE, plaintiffs in error, vs. MILDRED A. F. ROYSTON, administratrix, defendant in error.

- [1.] It is not too late, under our equity system, to purge an answer of impertinence or scandal, after replication filed.
- [2.] It is no error to allow counsel, while addressing the jury, to use and refer to a written argument.
- [3.] In charging rent against a guardian, for lands occupied by him, it is right to allow him credit for the value of improvements put on it by him; but then he must be charged with the rent as increased by this superadded value to the land.
- [4.] It is proper, in estimating the value of rent, to receive evidence of the rent brought by neighboring lands of like quality, during the same time, and also evidence that, during that time, many neighboring lands lay idle, and that it was common there for renting plantations to be rented once in every four or five years for no price but repairs.
- [5.] There is no law authorizing the administrator of a deceased guardian to make returns to the Court of Ordinary, of moneys paid out for the ward, either by the guardian in his lifetime, or by the administrator afterwards, and such returns, when made, are not evidence for the benefit of the guardian.
- [6.] It is error to receive the sayings of a guardian in his own favor, offered by himself or his administrator.
- [7.] Where a guardian puts out the money of his ward at interest, and has to resort to suits to collect it back, it is right to allow him reasonable attorneys' fees for the collection.
- [8.] The only Act (1792) which provides for a forfeiture of commissions, on account of a failure to make returns, does not embrace *guardians*, and these, therefore, are entitled to the commissions prescribed by the Act of 1764, without regard to their making or failing to make returns.
- [9.] The rule of interest against guardians, &c., is as follows. Up to the 1st January, 1848, simple interest is the rule, and compound interest the exception—simple interest except in cases where there is fraud or gross negligence.

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and then compound interest, the compounding to be done at the end of each period of six years. And the *rate* of interest, whether simple or compound, is 8 per cent. per annum up to the 1st January, 1846, and after that, 7 per cent. per annum up to the 1st January, 1848. After 1st January, 1848, the Legislature has prescribed a rule of its own—7 per cent. per annum for the first six years, without compounding, and 6 per cent. per annum compounded annually.

- [10.] The failure of a guardian to make returns of the interest accumulated in his hands, is not by itself sufficient to authorize the finding of fraud, and the charging of compound interest.
- [11.] The disbursements of a guardian ought to be made out of interest, and not of principal.
- [12.] The guardian is entitled each year to retain in his hands, from the beginning of the year, without interest, enough of the funds to cover the disbursements of that year.
- [13.] The commission on interest to which a guardian is entitled, is $2\frac{1}{2}$ per cent. as the lowest limit, and 10 per cent. as the highest—the latter to be reached or not, according to the opinion the jury may form of the skill and fidelity with which he has managed the estate—the former the rule where interest accumulates in the hands of the guardian without *lending out*. But upon all interest *received* (from lending out) and paid away, he is entitled to at least 5 per cent.— $2\frac{1}{2}$ for receiving and $2\frac{1}{2}$ more for paying away.

In Equity. Tried in Dougherty Superior Court, before Judge ALLEN, November Term, 1857.

This was a bill filed by Cyrus A. Royston, and wife, formerly Mary Frances Calaway, against Mildred A. F. Royston, administratrix with the will annexed of Geo. D. Royston, deceased, former guardian of said Mary Frances, for an account and settlement of her estate, which came into the hands and possession of said guardian.

The bill states, that said Mary Frances was the daughter of Felix G. Calaway, deceased, and entitled to a distributive share of her father's estate. That being a minor, Geo. D. Royston was appointed her guardian in the year 1837, and received a large estate belonging to her, consisting of money, notes, negroes and land, which he held and controlled until his death, without fully accounting for the same.

The bill contains various distinct and specific charges, which will fully appear in the proceedings had on the trial.

Defendant filed her answer, and the parties went to trial.

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All the facts necessary to a full and clear understanding of the points and questions adjudicated, are embodied in the bill of exceptions and the opinion of this Court following :

GEORGIA, DOUGHERTY COUNTY.

Be it remembered, That on the tenth day of December, at the November Term of the Superior Court of said county, 1857, the case of Cyrus A. Royston, and his wife, Mary Frances Royston, (late Mary Frances Calaway,) against Mildred A. F. Royston, administratrix with the will annexed of George D. Royston, deceased, it being a case in equity for an account of the actings and doings of the said George D. Royston, as guardian of the said Mary Frances Royston, from September, 1838, till his death in March, 1852, and relief; and the same being announced ready for trial by the parties, the solicitors for complainant moved to strike from the answer for impertinence, the charge that Edward Swaine, who had intermarried with ——— Calaway, the other child of Felix G. Calaway, the sister of the said Mary F., had settled with the administratrix on the terms proposed by her to the said Cyrus A. Royston and his wife, and had allowed her in the settlement one-half the note on Thomas Chaffin, which was a matter of litigation with the parties, and the said Court, the Hon. ALEXANDER A. ALLEN, Judge, denied the motion, and the complainants excepted. And the said complainants, by their counsel, also moved the Court to strike from the answer the calculation made by defendant's counsel on the return, and exhibited as part of their answer referred to as being impertinent, and as not being really a part of the answer, to which counsel for respondent objected, and the Court sustained the objection and refused to strike the calculation from the answer, and the counsel for complainants excepted, and now assigns said decisions and ruling as errors. And the cause being submitted to the jury, the return of the said George D. Royston, made to the Court of Ordinary of Taliaferro county, was submitted as certified by J. Oneal, Clerk of the Court of Ordinary, the same being an exhibit to complainant's bill

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—and then read in evidence the depositions of *Gilbert Kent*, taken by commission, who swore, that he borrowed five hundred dollars of Geo. D. Royston, to the best of his recollection, in 1839 or 1840; that it was six years before he paid it all, reducing it gradually every year. He paid $12\frac{1}{2}$ per cent. interest upon the money all the while except the last year; that year he paid 8 per cent. Don't recollect now what the whole he paid Royston amounted to. The note he gave Royston was payable to Geo. D. Royston, guardian of the orphans of Felix Calaway. Royston told witness that the money belonged to the orphans of Felix Calaway, deceased.

The counsel then read in evidence the depositions of *William Peake*, who swore, that he had never known the land of F. G. Calaway before his death; first saw it in September, 1838, and became well acquainted with most of the cleared land in 1839, having cultivated a part of the plantation during that year as a renter, and he also cultivated a part of it the ensuing year—renting the second year from Dr. Royston, who, to the best of his knowledge and belief, controlled and occupied the plantation until his death. Does not distinctly recollect whether his agent rented the part he cultivated in 1839 from Dr. Royston or from the administrator of Dr. Calaway. He supposed there were between three and four hundred acres of cleared land at that time—perhaps more—the most of which he considered first quality. He was willing to rent the plantation for a term of ten years, and said he was willing to give an annual rent of one thousand dollars for ten years to come. He considered the plantation worth this sum, or, one thousand dollars annually during the last five or six years now past. These depositions taken 25th May, 1855. He has not particularly known the plantation or examined it; does not know, of his own knowledge, what was Dr. Royston's manner of renting out the land; whether he advertised or notified the people of the time and place of renting or not; was never present at any public renting of the and; in 1840 he rented a field of forty or fifty acres privately

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from Dr. Royston, at four dollars per acre. His opinion of the annual value of plantation, as a rent, may be known from the offer he hereinbefore mentioned. Does not recollect what reason Dr. Royston may have assigned why he did not improve or clear the land. That Chaffin gave his note to Dr. Royston, as guardian, for eight or nine hundred dollars for borrowed money; witness was security on the note, and some time in the fall of 1840 gave notice to Dr. Royston to bring suit on said note, because he believed that Chaffin would soon fail, and he was unwilling to stand any longer for him. In a few days or weeks Dr. Royston gave up the note on which he was security, and took in lieu thereof, Chaffin's individual note without security. The Dr. remarked that "he was not afraid to trust Chaffin," or words to that effect. That about the year 1841 he was at Dr. Royston's home in Baker county, and being about to pass by Mr. Pope's house, the Dr. requested him to inform Mr. Pope that he wanted the latter to pay off a note or a part thereof. The Dr. remarked to him that Pope was giving $12\frac{1}{2}$ per cent. on the money; was not requested to collect the money, but only to notify Pope that the money was needed by Royston. Does not remember Pope's saying anything about the rate of interest, and in answer to the cross interrogatories, swore that he was well acquainted with most of the cleared lands in 1840, and since that time has not particularly examined the cleared lands. Has often passed the houses in which Dr. Calaway lived; was acquainted and is acquainted with the houses put on the premises by Dr. Royston, which are located between a quarter and half mile from the old Calaway houses. In my judgment the buildings of every description erected by Royston are worth about five hundred dollars more than those left on the premises by Dr. Calaway. Is not acquainted with the clearings of land or the fences made by Dr. Royston. Dr. Calaway died in 1836, he thinks. At the time he signed the note as security to Chaffin, he considered him solvent, but some time before Christmas, 1841, he did not consider him

solvent, and was unwilling, for this reason, to stand any longer for him, and so notified Dr. Royston, who gave up the note and took Chaffin's individual note, without security, remarking he would trust Chaffin, or words to that effect. At the time of this last transaction, he is not aware that prudent men did lend money to Chaffin without good security; he certainly would not have done so. He did, while he considered Chaffin solvent, stand security for him for large amounts, and had subsequently to pay large amounts for him. At the time he gave notice to Dr. Royston, he considered Chaffin very doubtful indeed, and at that time Chaffin had not notified his securities of his true condition, nor had he turned over any portion of his effects, or property, for their protection, so far as he knows or believes.

The complainants then read the depositions of *James Peake*, who swore, that he did not borrow money of George D. Royston, but that said Royston bought notes on him, and waited with him from one to three years to pay them. Dr. Royston said it was money belonging to the heirs; he said he had purchased negroes, some mules and wagon, with his own money, which had about exhausted his funds, or a little more. The notes traded for on witness amounted to something near two thousand dollars; he can't say whether it was over that or under it, at $12\frac{1}{2}$ per cent. G. D. Royston told him he was loaning money belonging to the heirs, part of which he loaned at $12\frac{1}{2}$ per cent.; as to how much and how long, does not know.

Complainants then introduced *Benj. O. Keaton*, who swore, that he knows the land; worth \$3 per acre rent from 1840 to the death of Dr. Royston in 1852, annually; never heard of any public renting by Dr. Royston; Dr. Royston went into possession soon after his intermarriage with Mrs. Calaway; don't remember when that was. There were from 300 to 400 acres cleared land when Dr. Royston took possession. The fence appeared in bad condition; Dr. Royston repaired fences, and put a good log cabin on it—four or five rooms to

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it; had a gin-house and screw; does not know what the house was worth; the land was worth two dollars per acre rent from 1840 to 1852, after deducting repairs.

Hamlin J. Cook was then introduced, who swore, that he borrowed money of Dr. Royston once at 8 per cent.; Royston said his rate of interest was 15 per cent. Said he had the money of Calaway's children to loan; refused to shave paper at less than 16 per cent. On cross-examination, said that he sold brick to Royston for the house he built on the lands. Dwelling, out-houses and gin-house were all worth \$1,200 or \$1,500. Dwelling house double pen, one and a half stories high log house. Royston cleared eighty acres; worth to clear it three to four dollars per acre. The defendant's counsel asked witness how much the improvements put on the land by Dr. Royston added to its value, to which counsel for the complainants objected, and the Court overruled the objection, and complainant excepted, and witness swore that the improvements added to the value of the land considerably, but how much he could not say; and that the Peggy Howard lands lay out in the year 1841 without rent; a portion of the Porter lands lay out part of the time between 1841 and 1850, and against the exceptions of counsel for complainants, witness was allowed to state it, it was almost the universal rule that every four or five years renting plantations were rented for repairs of the dilapidated portions of the plantation, and that the Henderson place, adjoining the Calaway lands, rented one year for fifty cents per acre, and to which the complainants excepted. The lands were worth two dollars per acre rent per annum, besides improvements. The house was built in 1842; was occupied by no one but Dr. Royston till his death. The Calaway lands are the very choice lands in the whole country.

U. M. Robert was then sworn, who said he rented land adjoining the Calaway plantation in 1849, and thinks the Royston place was worth two dollars for that year, and every year since; offered to rent the place one year, and Royston

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told him he wanted it himself; rented adjoining place from Clarke of Starksville, at \$1 or \$2 per acre, and place in a dilapidated condition. Peggy Howard's land rented by him was worn out, and the Royston lands as good as any in the country.

Wm. H. Robert, sworn by complainant, testified, that he attended to his father's (U. M. Robert) business on the Peggy Howard place, adjoining the Calaway or Royston place. He saw one advertisement stuck on a tree at the post-office at Dr. Royston's house, for the rent of the lands, and went there that day, and the place was rented out before breakfast; that he ate breakfast early and went immediately there, and was told when he got there, by Royston and his overseer, that the land was rented, and that Royston rented it. There was no one there but Royston and the overseer; that his father would have done better to have paid three dollars per acre for the Royston land than to have cultivated the Peggy Howard place free of rent. And complainants here closed their case.

Evidence for Defendants.

Wm. Newsom swore, that Dr. Royston moved on the land in 1841, the first of the year; cleared 75 acres and planted it in 1841—clearing on the east side of the creek; cleared 20 acres connected with the Proctor field, also on the east side of the creek. Cleared land on the west side of the creek, 300 or 400 acres before Newsom went there. The annual rent of the lands worth two dollars per acre, and the improvements kept up; thinks there is now open on the place five hundred acres. The twenty acres cleared in the Proctor field was fenced, and clearing not worth so much—gin-house, dwelling and other improvements worth \$500 or \$600. Knows the Jones or Howard place; knows that in 1852 that the lands were rented after breakfast—11 or 12 o'clock. He bid one bid himself, and Royston took it at the next bid. There was comparatively no competition in the bidding. Borrowe

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money from Royston at lawful interest; told witness that he did not lend at lawful interest to every one.

Jonathan Davis was next sworn by defendant, who testified, he knows the lands. The first year Royston worked the lands lands rented high, but for several years thereafter lands rented from twenty-five to fifty cents per acre; Howard lands rented one year for \$1 per acre, as valuable if not more so, than the Calaway lands. Witness rented one year the Island place, equal, or nearly so, to the Calaway place, at fifty cents per acre. To this testimony counsel for complainants objected, and the objection was overruled, and the complainants excepted. The Porter place, comparing favorably with the Calaway place, rented from fifty cents to \$1 per acre. From 1841 to 1854 a fair average price of the rent, with improvements, from \$1 to \$1 50 per acre. When Royston went there, could not have been more than two hundred and twenty-five to two hundred and fifty acres cleared—seventy acres cleared in one field and forty in another by Dr. Royston; worth to clear it, five to six dollars per acre. House put up by Royston is a double log house one and a half story, shedded in the rear and piazza in front—altogether worth \$800 or \$1,000. If the place had been rented at public outcry from 1841 to 1854, for three or four years, it would have brought its full value without reference to fences, but after that don't think it would have rented at all. Dr. Royston left it in good repair. The Hents place went into dilapidation. He was present one year when the Calaway lands were rented; Dr. Royston rented it himself—this was between 1841 and 1844. Don't remember whether David H. Janes was there. Has seen an advertisement for the rent of the land; don't remember what it brought. Knows nothing about the renting of the Calaway place but one year. The Island place was rented by witness one year, from 1841 to 1843. At the Howard renting, some thirty people were present. In 1841, 1842, 1843 and 1844, cotton ranged from three and a half to six cents. Complainants by their solici-

tors, objected to all the testimony of all the witnesses in relation to what other lands rented at—the objection being overruled and the evidence allowed, complainants excepted, and now assign the same as error.

Roger Q. Dickinson being sworn, the defendants proposed to prove the standing of Thomas Chaffin in 1840 and 1841, to which complainants objected, and the objection was overruled, and counsel for complainants excepted, and witness then testified that he knew Chaffin in 1840 and 1841, and that he was considered very good until about 1841; that W. Peake was his partner, and knew his circumstances better than any one else, and Dr. Royston knew that Chaffin and Peake had been partners, and that Peake had a good opportunity to know his pecuniary condition. Chaffin broke suddenly; Peake and others took his small notes in the early part of February, 1841. Chaffin's credit was good. Exhibited note of Chaffin's identical hand writing. A short time before 1st March, 1841, ninety-nine one hundreths of the people of Chaffin's acquaintance would have credited him readily. Chaffin and Peake had been in partnership before 1841, and Dr. Royston knew it. Witness and William Peake were on Chaffin's paper for a large amount. He would have thought it very imprudent to have given up Chaffin's note, with William Peake as security, and taken Chaffin's none without security in January, 1841.

The defendant then read in evidence Mrs. Calaway's election of a child's part in lieu of a dower out of the lands of F. G. Calaway.

The defendant offered to read the returns made by defendant, as administratrix with the will annexed on the estate of G. D. Royston, as annexed to answer as an exhibit—to which complainant objected: 1st. Because the Court of Ordinary of Lee county, to whom the returns were made, had no jurisdiction; and 2d. Because defendant could not make return of expenditures as guardian of the ward of testator: which objection was sustained, and counsel for defendant

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moved for continuance, and the Court having decided that the defendant was entitled to a continuance, counsel then withdrew the objection, and the returns were read as evidence. The note of Chaffin was then read, dated 1st January, 1841, due one day after date, for nine hundred dollars, and a receipt of C. A. Royston on 8th November, 1852, for three hundred and forty dollars, and another receipt of complainant for \$343 82, dated 7th March, 1853; one receipt dated November 10th, 1852, for \$3,800; one receipt dated 1st January, 1853, for \$3,000; one receipt dated 2d March, 1853, for \$800; and one other receipt dated 25th May, 1854, for \$2,625 09.

Defendant then offered to read the depositions brought into Court by complainant, of *James H. Ragan* and *Edward Janes*, and proposed to read that part of the depositions which gave the sayings of Geo. D. Royston, to which complainants objected, and the objection was overruled, and complainants excepted. They swore that George D. Royston said he would lose \$1,000, money he had loaned Chaffin; that the rent of the lands were worth from one to two dollars per acre from the time Royston had them.

Defendant introduced the testimony of *Thomas Chaffin*, (and complainants objected on account of interest, and the Court overruled the objection, and the complainants excepted,) who swore, that he had many pecuniary transactions with G. D. Royston, the last of which, fourteen years ago, and he gave Royston his notes; does not remember whether it was on his individual account the money was loaned or his ward's; note not yet paid; that his circumstances were prosperous when he borrowed that time; did borrow of prudent men without security. William Peake, Royston, and others, were on his note, or notes, as security, and he turned over to Dickinson, Peake and Dewberry's assets of fifty thousand dollars, to save them, as he thought, amply sufficient to protect his sureties. Dr. Royston loaned him the money in good

faith; that he had good reason to believe he was solvent; that witness failed suddenly.

Jonathan Davis, recalled.—Thinks about two hundred and fifty acres cleared land when Royston got possession. Royston loaned Oglesby money at eight per cent, and Dr. Royston said he did not loan his ward's money at over eight per cent, or lawful interest. To the sayings of Royston, counsel for complainants objected, and the objection was overruled by the Court, and complainant excepted. He was very well acquainted with Thomas Chaffin in 1841; was good until the first of the year 1841; that his failure was sudden and expected to his friends. On *cross examination*, said Royston loaned Oglesby \$1,200 or \$1,500, and it was sometime between 1840 and 1845; Chaffin was a man of large business, and a speculator. Peake and Dr. Dickinson stood his security. He bought and sold land. In the beginning of 1841, witness stood Chaffin's security on amount; that he knew of the loans to Oglesby by hearsay alone. All this ruled out by the Court.

David A. Vason was then sworn, who stated that Dr. Royston held a note, principal and interest, for about \$10,000 at the time stated, on Oglesby; Pope's note about the same amount, probably less; one payment on Pope's note made a short time after his death. Pope died June, 1846; settled at eight per cent. Rents from 1841 till 1844 very low; Schley's place, William's place, Porter's place, Hents' place, and a large number of places vacant; that the lying out of these lands affected considerably their value. To this evidence objections were made by complainant and overruled by the Court, and excepted to by complainant. That this plantation could have sold within two years for twenty dollars per acre; thinks it worth that now. The defendant asked witness thus: "Mr. Vason, do you know what efforts Mrs. Royston made to collect money to pay complainants?" To which the counsel for complainant excepted, and the Court overruled the objection, and counsel for complainant excepted, and witness

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then testified, that soon after Mrs. Royston took charge of the estate, she instituted suits to a large amount to get money to pay off Dr. Royston's wards, and it was worth two and a half or three per cent. on the amount. Paid Oglesby's note; 6 or \$8,000. There was at the time Dr. Royston took possession of the land, two hundred and twenty acres on west side of the creek, and Proctor field on east side of forty acres. On *cross examination*, Royston cleared seventy or eighty acres; cleared in another field forty acres. To clear the lands was worth eight or ten dollars per acre. Did not come here till 1840. Paid off part of Ogleby's note in money and part in other notes payable to Mrs. Royston, as executrix, and was given for rent of land and purchase made at sale of Royston's property, one thousand and one hundred dollars paid in a note on Joseph Bond.

W. J. Lawton sworn for defendant, and says: That the assets of G. D. Royston, consisting in lands, negroes, mules and notes; some notes payable to Royston as guardian, but most of them to Royston individually. Mrs. Royston proceeded to collect notes, and gave five per cent. for the first \$1,000, and two and a half per cent. for all after; cannot say what amount was payable to Royston as guardian. He, as agent for defendant, rented the land once to Oglesby at \$900 one year, (1853;) worth as much in 1850, 1851, 1852 as in 1855. Over twenty thousand dollars of notes of hand at his death, and all have been collected.

The complainants in rebuttal, introduced *William H. Robert*, who swore: That he heard George D. Royston say that he had \$10,000 of his ward's money out at interest, and loaned it out at twelve and a half per cent. The evidence being closed, counsel moved to detach from the answer a statement and calculation made by defendant's counsel. The Court ruled it was not evidence, and admitted it as pleading.

The evidence and argument of counsel having closed, complainant's solicitors requested the Court to charge the jury, 'that by the Act of 1792, executors and administrators are required to make annual returns of the state and condition of their estates by the first day of January, or within ten days thereafter, and that by Act of 1810, it was extended to guardians, and that the Act of 1792, was of force as regards the time within which the returns are to be made until the Act of 1850, which extends it to 1st July, and that unless full and correct returns are made and rendered in manner pointed out by law in each and every year, the executor, administrator, or guardian shall prefix his commissions," and which the Court refused to do, but gave the request with the qualification that the executor or administrator would be entitled to commissions for the year for which returns were made.

2d. That if the Jury believe there was a fraud practiced by Dr. Royston in renting the ward's lands, they are authorized to go behind the returns, and find the real value of the rents of the land, and that in ascertaining whether there was a fraud in relation to the rents, they are authorized to look to the amount of rent in 1839, and to the amount of rent in 1840, and if the jury believe that Dr. Royston rented out the land in 1839, and that Royston moved to and occupied it in 1840, and the rent was \$299 or \$399, in 1839, and \$24 in 1840, and the renting was private and in secret, and at any time rented before breakfast, these facts found to exist, the jury may infer fraud. This was given as the law.

3d. That if the complainants in this bill were attempting to recover the value of the land in this suit, then the defendant would be entitled in equity to set off the value of the improvement put upon the premises by Dr. Royston; but if the jury believe from the evidence the building of the dwelling house, gin house and cotton screw, &c., were put on the farm by Dr. Royston in 1852, for his own use and convenience, and that he occupied the premises until they become

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dilapidated, then these improvements or value thereof ought not to be allowed the defendant, and the Court refused so to charge, and complainant excepted.

4th. That to entitle a guardian to commissions, he must make his annual returns as pointed out by law, and he is not entitled to any commissions upon any funds of which he has made no returns;* and hence no matter what amount of interest Dr. Royston, as guardian, may have made, yet if he has made no returns of interest he cannot be allowed any commissions on interest accumulated in his hands; and which he refused to charge, to which complainant excepted.

That if the jury believe from the evidence that there is any fraud exhibited, either in Royston's returns or the parol evidence, as to the renting of the land, or of making no returns of the accumulating interest in his hands, then the mode of computing the interest is to calculate the interest at eight per cent. per annum, for six years, upon the amounts coming into the guardians hands, and at the end of every six years to compound it up to the 1st January, 1848; and from the 1st January, 1848, calculate the interest at seven per cent. for six years, and after six years compound annually at six per cent., and that this latter method obtains whether there has been any fraud or not since 1848; and which charge he refused to give entire, and to which refusal complainants excepted. The Court gave this request except the sentence "or in making no returns of the accumulating interest in his hands."

That if the jury believe from the evidence that Dr. Royston, in 1840, rented to Wm. Peake forty or fifty acres of the land at \$4 per acre, and returned rent for that year, only \$24 65, this is strong evidence of fraud, and the jury will make him open all the returns of rent and find the real value as proven by the evidence; and if the jury so find, compound

* The Court gave in charge the first part of this request, but refused the deduction.

interest is to be computed against defendant, as specified in the seventh request, and which the Court refused to charge, and to which refusal to charge in the several requests, and to the charges made, the counsel for complainant excepted, and now assigns the same as error.

And the counsel for defendant requested the Court in writing, to charge the jury, 1st, that defendant is entitled to two and a half per cent. on all sums received by G. D. Royston, as guardian, and two and a half per cent. on all sums paid out by him, as guardian, in those years that he made returns; and, 2d, that he is entitled to ten per cent. commissions on all the gross accumulations of interest on the fund in his hands during his guardianship; and which the Court charged, and the counsel for complainant excepted to the charge, and now assigns the same as error.

The complainants asked, as the fifth ground, the Court to charge, that in making a settlement with a guardian for trust funds in his hands, simple interest at eight per cent. per annum on the principal to 1st Jan., 1846, and at seven per cent. per annum from that time *is the rule*, and that rests are the exception to that rule, and a rest is never allowable unless a special case is made of gross neglect, fraud, or some such circumstance is shown; and in the sixth ground, that in making their calculation they must keep the principal sum, and cannot separate and pay the expenses out of the interest, when a sufficiency had accumulated in the hands of the guardian for that purpose; to which charge the counsel for complainant excepted, and now assigns as error. And the seventh ground of request of defendant was, that if they are satisfied from the evidence that the funds of this complainant in the hands of Royston at his death were in notes, and she had to pay lawyers commissions to reduce the same to money to meet this demand, then defendant is entitled to a deduction of so much of said fees as has been proved. And

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in the eighth ground, that in making their calculations from the first, the guardian is entitled to retain enough of the fund in his hands, without paying interest on the same, to cover the disbursements for the following year; to which charge the counsel for complainant excepted, and now assigns the same as error. In the ninth and tenth ground, the counsel for defendant requested the Court to charge the jury, that if they are satisfied from the evidence that the land was fairly rented, and brought all that it would, then complainant cannot disturb the rent returns as made; but if they are not satisfied the renting was properly done, or brought what the land was worth for rent, or what it would have done if otherwise rented, then they can open the returns and go for the value of the rents; but in doing this they may take into consideration the improvements put by Royston on the plantation, the clearing the land, building of houses, and keeping the plantation in proper state of cultivation, and if these improvements were worth more (taking into consideration the increased value of the land, these when added to the rents charged,) than the actual value of the rent for the whole time, then the complainant will not be entitled to recover anything on account of the low amount of the rents returned; and which the Court charged, and to which charge the counsel for complainants excepted, and now assigns the same as error.

In the eleventh and last ground, the counsel for defendant requested the Court to charge the jury, that under the statute of 1810, it is not necessary that the guardian shall make his return within ten days from 1st January in each year. It is sufficient that the returns are made annually; that it is not necessary for a guardian, in his annual returns, to include the amount of the accruing interest; it is only necessary to charge himself with the principal sum received, and report all the disbursements made for the year previous; and which was given in charge by the Court, and to which counsel for complainants excepted, and now assigns the same as error. And also assigns the several rulings and charges and refusal

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to charge as requested by complainants, as error, and prays that this bill of exceptions may be certified, &c.

WARREN & WARREN; and SCARBOROUGH, for plaintiffs in error.

STROZIER; SLAUGHTER; LYON & IRWIN; VASON & DAVIS, *contra*.

By the Court.—STEPHENS J. delivering the opinion

This is a bill by Cyrus A. Royston and wife, against the administratrix of George D. Royston, who was guardian of the wife, for an account of his ward's estate. Each party brings a writ of error, but by combining the two cases, each side assigns error in this case, wherein the complainants below are plaintiffs in error.

[1.] The first assignment of error by the complainants, is the refusal of the Court to strike out, as impertinent, a portion of defendant's answer, instituting an invidious comparison between this complainant and one Swain, who stood in the same position, but who is represented as having acted a much more generous part. It was conceded in the argument that this portion of the answer was not pertinent, and was calculated to injure complainant's case, but it was insisted that the motion to strike it, coming after replication, was too late. Such seems to be the rule under the English system of equity, but the reason for the rule under that system does not apply under ours. There to have an answer purged of impertinence or scandal, it must be referred to a master. This involves delay, and hence will not be allowed generally, after the case is ready for a hearing. But here it is done by the Judge, on motion, at any time before the case is submitted to the jury, and one time for it involves no more delay than another. *Cessante ratione legis, cessat lex*. We think the Court erred in refusing to purge the answer.



[2.] The next assignment of error by the complainants, is the refusal of the Court to strike from the answer a calculation which formed a part of it. The calculation is not before us, it having been voluntarily withdrawn by the complainants, as we learn from the argument, and we cannot, therefore, form a very satisfactory opinion as to whether it was obnoxious to objection or not. But we think its withdrawal cured whatever objection there might have been to it. It is said that counsel were allowed to argue upon it after it had been withdrawn. Argumentativeness may be a good objection against an answer, but it will scarcely serve against a *speech*. We think there is no error apparent in this assignment.

[3.] The contested items in the account were mainly rent and interest, and the next assignment of error is the allowance by the Court of evidence to show, by way of reducing rent, how much value was added to the ward's land by improvements put on it by the guardian, while it was in his hands. We think there was no error here. It was proper that the guardian should be credited with the value of the improvements made by him, but at the same time he should have been charged with the rent as increased by that super-added value to the land.

[4] We think the next assignment of error is bad. It was proper to admit evidence showing that neighboring plantations lay idle during some years while the guardian had possession of this plantation, for this was a circumstance legitimately tending to lessen the rent, by showing the dull demand for lands. Nor was there any error in admitting evidence that it was very common for renting plantations to be rented once in every four or five years, for no price but repairs, nor in admitting evidence of what rent other similar lands, in the same neighborhood, brought during the same years. The thing to be proven was the market value of the rent—a matter of judgment, and he who has reasons for his judgment is, at least, as good a witness as he who has none.

All these things are only reasons for the judgment of a witness.

[5.] The next assignment of error is by the defendant. She, as administratrix of the guardian, offered to put in evidence returns made *by her* of moneys paid out by her after the death of the guardian, and also of moneys paid out by the guardian in his life-time, but not returned by him to the Court of Ordinary. We think this evidence was properly rejected by the Court. There is no law authorizing the administrator of a deceased guardian to make returns for him. These items ought to have been proven in the same manner as all other unreturned items.

[6.] The defendant was allowed, against the objection of complainants, to give in evidence the sayings of the guardian to show at what rate of interest he had lent his ward's money, and also to show that in relation to a certain sum which he had lent to Chaffin, and for which the ward was seeking to hold him liable on account of his negligence, he had used the same care and diligence that he had used with his own money. A fatal objection to the evidence is, that it was his sayings in his own favor, offered by himself. It was improperly admitted.

[7.] The defendant was allowed, against the objection of complainant, to give evidence of her having to resort to law in order to collect the money which had been lent out for the ward by the guardian, and of reasonable attorney's fees for these collections. We think this was proper evidence, taking strict care to confine it to collections of moneys which were certainly the ward's.

[8.] The evidence being closed, the complainants asked the Court to charge the jury, that if the guardian had failed to make return of his acts by the 10th day of January, for any year prior to 1850, he had forfeited his commissions on the whole estate. The Court refused so to charge, but charged instead that he was entitled to commissions on all returns which had been made in time. We think the charge

asked was properly refused, and that the charge, as given, was less than the defendant was entitled to have had. The Act of 1792, (*Cobb Dig.* 306,) is the only one providing for a forfeiture of commissions on account of a failure to make returns; and, singularly enough, it does not embrace *guardians* in that provision. Guardians, therefore, are left to stand on the Act of 1764, (*Cobb Dig.* 304,) prescribing commissions without regard to the making or omission to make returns.

[9.] On the charge in relation to interest both sides assign error, and without repeating what the charge was, I will state what we conceive the true rule of interest to be. Up to the 1st of January, 1848, when the Legislature prescribed a rule from that time forth, we think simple interest the rule, and compound interest the exception—simple interest unless there be fraud or gross negligence on the part of the guardian, and in case of such fraud or gross negligence, then compound interest, the compounding to be done at the end of each six years. And the *rate* of interest, whether simple or compound, is eight per cent. per annum up to the 1st January, 1846, and after that, seven per cent. per annum up to the 1st of January, 1848. After 1st January, 1848, the Legislature has prescribed a rule of its own. For trustees, who were such at the passage of the Act, (as this one was,) that rule is seven per cent. per annum for the first six years from and after the 1st January, 1848, without compounding, and afterwards six per cent. per annum, compounded annually.

[10.] We think the Court properly refused to charge the jury, as he was asked in substance to do, that the guardian's failure to make returns of the accumulating interest in his hands was a circumstance by itself, authorizing them to find fraud and charge compound interest. It is very seldom that trustees do make returns of such interest accumulating in their hands. It is very proper they should do so, but their failure is not sufficient of itself to authorize the conclusion of fraud. To so hold, would be to taint nine-tenths of all the returns in the country with fraud, at a single blast. We

think, also, that the Court was right in refusing to charge the jury, that the fact of the guardian's having, in 1840, rented out a part of the land for \$160 or \$200, returning only \$24 65 rent for that year, was strong evidence of fraud. The jury ought not to have been instructed that that single fact was "strong evidence of fraud," for it was open to explanation from other circumstances, as for instance the improvements which he had put on the place that year, and the jury ought, therefore, to have been left to consider that fact in connection with all the rest, in making up their judgment as to fraud or no fraud, and so compound or simple interest.

[11.] We think the disbursements of the guardian ought to have been made out of interest, and not out of the principal. There is some difficulty in understanding what the charge was on this point, and we simply pass it with stating what it ought to have been.

[12.] We think the Court committed no error in charging the jury, that the guardian was entitled each year to retain in his hands, without interest, from the beginning of the year, enough of the funds to cover his disbursements for that year. It would be unreasonable to charge him with interest on a fund which he must hold and not use, in order to meet, as is his duty to do, the current expenses of the year.

[13.] Another point in the record is, in relation to the guardian's commissions upon *interest*. The conclusion to which this Court came on this subject is as follows: It is not a matter of course that the guardian is to have ten per cent. commission on all interest. The lowest limit is two and one-half per cent., for by the statute he is entitled to two and one-half per cent. on all sums "paid away in debts, legacies, or otherwise," and as the interest must be paid away by him in his settlement with his ward, he is entitled to two and one-half per cent. on that, as on principal. On the other hand, ten per cent. is the highest limit to which he may reach or not, according to the opinion which the jury may entertain of the skill and fidelity with which he has managed the estate.

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The provision in relation to ten per cent. on interest, does not *confer* that amount of commission, but is only a *proviso* that the commission shall not *exceed* ten per cent. on the interest. When the guardian simply allows the money of his ward to remain in his own hands without lending out, and thus renders himself chargeable with interest, this is a case for two and one-half per cent. only; but when he lends out the money to other people he is entitled to five per cent. commissions on interest, for in this case he *receives* interest and (on final settlement) pays it away, and on each operation he is entitled to two and one-half per cent., or which is the same thing, five per cent. on the two together. Such is the conclusion to which this Court came, upon the subject of commissions on interest; but while I avow, as the truth requires I should do, my full share of the responsibility of that conclusion, candor demands that I should say that subsequent examination and reflection have satisfied me that the conclusion is an erroneous construction of the Act of 1764. It is needless to state here what I now deem to be the true construction, for stated under these circumstances it would be a mere *dicum*, I might want to take it back at some other time. This branch of the case was was not discussed at all in the argument, and the decision, therefore, is scarcely to be regarded as a well considered one. I make this remark simply by way of protesting against its being drawn into an authoritative precedent. A decision pronounced upon full argument and consideration, is justly entitled to great weight; indeed, to a controlling influence on subsequent decisions; but such decisions as this Court, from the nature of its organization, is sometimes obliged to render, without argument, and on short consideration, ought, in my judgment, to carry but slight *authority* for subsequent decisions.

Judgment reversed.

JOSEPH P. PHILLIPS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] On the trial of a person charged with burning a jail, the citizens of the county, are competent for jurors.
- [2.] When the Sheriff or his deputy are disqualified to summon a jury, the Court may order any disinterested person to summon one.
- [3.] Hearsay is not admissible against a party, unless he assents to it.
- [4.] When a house is consumed by fire and nothing appears but that fact, the law rather implies, that the fire was the result of accident, or some providential cause, than of a criminal design.

Arson, in Calhoun Superior Court. Tried before Judge ALLEN, May Term, 1859.

The plaintiff in error was indicted for arson, in burning the jail of Calhoun county.

A panel of jurors was put upon the prisoner, to which he objected on the ground, that said panel was composed of citizens of Calhoun county, tax payers thereof, and the crime for which he was to be tried being for setting fire to the jail belonging to said county. The Court overruled the objection, and defendant excepted.

Another panel was put upon the prisoner, the first being exhausted, to which prisoner objected, on the ground that a large portion of this second panel, were jurors who had been on the first panel and discharged; and further, that they had been summoned by the Bailiff and not by the Coroner. The Court overruled the objection, and prisoner excepted.

The prisoner objected to each of said jurors, as they came to be sworn. The Court overruled the objection, and prisoner excepted.

A jury being empanelled, the State introduced the jailor, *Foster*, who, after being sworn, stated, amongst other things, that on the night of the fire, when he went to the jail, and as he ran to relieve the prisoners from the danger they were in, he hallowed out to the defendant, "you rascal, you have

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set fire to the jail and you will burn up in it;" but did not know whether the prisoner heard him or not, or whether he made any answer, as he did not wait to hear. Counsel for prisoner objected to the sayings of the jailor being given in evidence. The Court overruled the objection, and counsel for prisoner excepted.

The counsel for the State then asked the witness why he thought the prisoner burnt the jail, and counsel for prisoner objected to the question. The Court overruled the objection, and allowed the question to be put, and the witness to go on, and give his reason and opinions. To all of which, counsel for prisoner excepted.

The case being closed, counsel for prisoner requested the Court in writing to charge among other charges, as follows, to-wit:

1st. That the proof of circumstances however numerous, of a tendency however strong or conclusive to establish guilt, avails nothing, unless the facts that the crime has been actually perpetrated be first established.

2d. That the fact that the crime has been actually committed by some one, must be proved by positive and direct evidence, and in such a manner that there is not the least doubt as to the act, for as long as there exists the slightest doubt as to the act, there can be no certainty as to the agent. The Court charged these two requests, with the following qualifications to each charge: That if the jury believed from the evidence that the jail was burnt, and it did not appear from the evidence, that it was burnt from some accidental or providential cause, then the law implied, that it was burnt by some one.

To which charge and refusal to charge as requested, counsel for prisoner excepted. The jury returned a verdict of guilty. Whereupon counsel for prisoner during the said Term, and before the adjournment thereof, moved for a new

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trial in the said case, on the grounds of error in the rulings, and charges and refusals to charge, as above excepted to, and on the following additional grounds, viz:

That the verdict of the jury was contrary to law.

That the verdict of the jury was contrary to evidence and without evidence. Which motion was overruled by the Court, and counsel for defendant excepted.

MORGAN, for plaintiff in error.

SOL. GEN.; and OGLESBY, *contra*.

By the Court.—BENNING J. delivering the opinion.

[1.] The jurors were not interested in the event of the suit. How could they be gainers or losers, by the conviction or acquittal, of Phillips. In either event they would as citizens of the county, have to contribute the same money to the building of a new jail.

If there was a challenge to the array, on the ground, that the Sheriff was the prosecutor, and that challenge was sustained, and the jurymen were discharged, it is doubtless true, that none of them was a competent person, to sit in the case. But, it is not clear from the bill of exceptions, that these things were so. Therefore, we pass the first ground stated and relied on, to the second objection.

The second ground was, that the second panel was summoned by the Bailiff, instead of by the Coroner.

[2.] The Bailiff was ordered to do this service, by the Court; and power to make the order, was in the Court. The Act, (Judiciary) of 1799, says; "when the Sheriff or his deputy are disqualified," "jurors shall be summoned by the Coroner, or such other disinterested person, as the Court may appoint." *Pr. Dig.* 430.

We find no error, therefore, in the Court's ordering the Bailiff to summon the talesmen.

So much for the first two exceptions.

What the witness, Foster said, as he ran to the jail, was mere hearsay, unless it was assented to by Phillips. And there was no evidence that Phillips assented to it, none, even, that he heard it.

[3.] We think, therefore, that the Court erred in receiving as evidence, what Foster said.

If the Court allowed Foster to tell the jury, that his opinion was, that Phillips burnt the jail, we think, the Court erred. We, suppose, however, that the Court received the saying of Foster, on another ground, than that of a witness's belief being evidence, viz: on the ground, that the saying was addressed to Phillips himself.

As to the first request—if the fact, that the *crime* has been actually perpetrated, has to be first established, before circumstances can avail anything, what use is there for circumstances at all? Certainly none. It may *perhaps* be true, that, in a charge of murder, *death* must be shown—the *finding of a dead body* must be shown—before circumstances will be sufficient to warrant a conviction. But this death is not the *crime*; it is what is called the *corpus delicti*. And so *perhaps* in other cases, the *corpus delicti* has to be shown, before there can be a conviction on circumstantial evidence. But in the present case, what was the *corpus delicti*? Obviously, that the jail was burnt. See *Best on Pres. sec's* 201, 204; 2 *Hale, P. C.* 290; *Wills on Circum. Ev.* 105; 1 *Stark Ev.* 575; *C. C. & P.* 176.

What is thus said of the first request, is equally applicable to the second.

[4.] But whilst we cannot go the length of these requests, we are equally unable, to concur with the Court below, in the qualification which it engrafted on the requests. Is it true, that if a house is consumed by fire, we are *bound* to believe, that some person intentionally set it on fire, unless it

is *shown*, that the fire was the result of lightning, or accident. Surely not. Rather is it true, that, if nothing appears but the mere fact, that the house was consumed by fire, the presumption, which we are authorized, if not required, to make, is, that the fire was the result of accident, or of some providential cause.

New trial granted.

ELIAS G. Goss, plaintiff in error, vs. MARY Goss, defendant in error.

[1.] The power of granting temporary alimony, belongs to the Superior Court as an incident to its jurisdiction over divorces, and not to the Judge. He cannot exercise it in vacation; and the husband is entitled to notice and a hearing, before it is granted in Court.

[2.] Attachment, and not *feri facias*, is the proper mode of enforcing an order for alimony.

Illegality, in Webster Superior Court. Decision by Judge KIDDOO, March Term, 1859.

This was a motion to quash and set aside an execution against plaintiff in error, upon the following grounds:

1st. Because said execution issued upon an order or judgment granting alimony to plaintiff *in fi. fa.*

2d. Because the order granting alimony, was made in vacation, and at chambers, and without notice to the defendant.

After argument, the Court overruled the motion to set aside, and defendant excepted.

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DOUGLASS & DOUGLASS; and REDDING & SMITH, for plaintiff in error.

E. H. BEALL; and McCAY & HAWKINS, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] The power of granting temporary alimony during the pendency of a divorce suit, was elaborately discussed and was decided by this Court, in the case of *McGee vs. McGee*, 10 Ga. Rep. 417. We think it was rightly held to be a power belonging to the *Superior Court*, as an incident to its jurisdiction over divorces. It belongs to the *Court*, and not to the Judge, and therefore cannot be exercised by him in vacation. We think also, the party against whom this alimony is allowed, should have notice and an opportunity of being heard.

[2.] We think also, that the proper mode of enforcing an order for alimony is by attachment and not by *feri facias*.

Judgment reversed.

JAMES R. GIDDENS, (for the use of TOLIVER JONES, EDWARD GIDDENS et al.,) plaintiff in error, vs. JAMES Z. DISMUKES et al., administrators, &c., defendants in error.

The failure to deliver property on the day of sale, and within the hours of sale, is a forfeiture of the forthcoming bond; and notwithstanding, the property is subsequently taken into custody by the Sheriff, it is not necessarily a discharge of the bond; but damages may be recovered for any expense which has been incurred by reason of said failure, as well as the depreciation in the price or value of the property, between the first and second day of sale.

Debt on bond. Tried before Judge WORRILL, in Talbot Superior Court, September Term, 1858.

On the 24th day of May, 1844, James K. Giddens, then Sheriff of the county of Talbot, having in his hands three *fi. fas.* against Charles Evans and Henry D. Evans, executors of John Evans, deceased, levied them on a negro man named George. The plaintiffs in *fi. fa.* were Ezekiel B. Smith, Levi Turner, and Stallings and Persons. The defendants in *fi. fa.* gave to Giddens, as Sheriff, their forthcoming bond, with Benjamin T. Emanuel as surety, in the sum of twelve hundred dollars, conditioned to be void on the delivery, by the said defendants, of the boy George, to the said Sheriff, within the legal hours of sale, on the first Tuesday in July, 1844. This suit was brought on the aforesaid forthcoming bond, by James K. Giddens, for the use of Edward Giddens and Toliver Jones, the securities of said Sheriff Giddens, on his official bond, of Jacob Parr as assignee of Levi Turner, and of said Stallings and Persons. The declaration was filed in office 10th August, 1853. Pending the suit Charles Evans died, and Michael Woodruff, his administrator, was made a party in his stead. Benjamin T. Emanuel also died, and James Z. Dismukes and W. D. Emanuel, his administrators, were made parties in his stead.

Plaintiff opened his case to the jury, and read in evidence the answer of James K. Giddens to interrogatories, taken by commission, who testified that the negro, George was not delivered in satisfaction of said forthcoming bond, and that the *fi. fas.* against the Evanses were never paid—and that he had been released from all liability by Edward Giddens and Toliver Jones, and by Jacob Parr. Plaintiff also introduced in evidence said forthcoming bond; he then introduced the three *fi. fas.* already mentioned, then the record of a judgment, on a suit on the Sheriff's bond in Talbot Superior Court, for the default of said Sheriff in not

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selling the boy George under the levy of Ezekiel B. Smith's *fi. fa.* This suit was at the instance of the Governor of Georgia, for the use of said Smith, against Edward Giddens and Toliver Jones, his sureties on his official bond, and on which judgment was recovered in favor of Smith, at the September Term, 1851, of Talbot Superior Court, for the sum of two hundred and seventy-four dollars besides costs. The payment of this judgment was also proved.

Defendants then read in evidence the interrogatories and answers of *Richard Dozier* and *Thomas Clayborn*, who testified that they were in Talbotton on the day of said Sheriff's sale (first Tuesday in July, 1844;) that they saw Henry D. Evans there, and saw the negro George there during the hours of sale; that the negro was near the court-house where the Sheriff was selling property; and Dozier testified, that the negro was, at one time during the day, moving trunks, which he supposed had been levied on by the Sheriff, from one part of the court-house to another part of it. Both witnesses testified, that Henry D. Evans and the negro George disappeared about one week after the day of sale.

George McDowell testified, that he saw the negro George on said sale day, near the steps of the court-house, where the Sheriff was selling some clothing and trunks. Did not see any delivery of the negro by Evans to the Sheriff.

Defendant then offered in evidence the following letters:

"*Dear Col.*:—Mr. Henry Evans gave bond and security for the appearance of the negro that was levied on to be sold to-day. That bond was for his appearance to-day. The sale has been postponed, and he wishes to know if you will let him take the boy home and give bond hereafter.

[Signed]

Yours,

SMITH.

If so please instruct Mr. Giddens."

"I wish to give Mr. Evans no unnecessary trouble. Let him have the boy; and bring the Sheriff a bond for the de-

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livery of the boy by this day week. I suppose that will be satisfactory to the clients of Towns & Smith.

[Signed]

Yours,

GEO. W. TOWNS."

Levi B. Smith testified, that he saw the negro about sundown on the day of said sale, standing near a china tree in front of Brown's store in Talbotton; Henry Evans and Giddens, the Sheriff, were inside the store; the negro was considered in the possession of the Sheriff; Evans wanted witness to consent for him to take the negro back home; witness refused to take any responsibility in the matter, but referred them to Col. Towns, and, at their instance, wrote the letter to Col. Towns above in evidence. Attended the sale off and on during that day; consented to no postponement of the sale. Did not see the negro until after sale hours; witness urged the sale of the negro; does not know that the Sheriff postponed the sale of the negro; knows nothing going to show that the Sheriff failed to do his duty. Smith & Towns were the attorneys at law for Stallings and Persons, and for Levi Turner, in the *fi. fa.* of which Parr is assignee. From reading the note addressed to Col. Towns, witness is satisfied the contents thereof are true, but has no recollection of the contents independently of the note.

Here the testimony closed, and the Court having charged the jury, they found a verdict for the defendant. At the same Term of the Court, and before judgment the plaintiff moved for a new trial on the following grounds:

1st. Because the Court refused to permit the plaintiff to prove the insolvency of Giddens, the Sheriff.

2d. Because the Court erred in charging the jury, that if said Giddens, Sheriff, on the day of sale, or before that time, and if on the day of sale, whether within the hours of sale, or after sale hours had expired, agreed and consented to postpone said sale, then the liabilities of defend-

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ants, upon the bond, were thereby discharged. And this is the law, notwithstanding the jury may believe, from the evidence, that the negro was not delivered to the Sheriff, within the hours of sale on said sale day.

3d. Because the Court erred in charging the jury, that the measure of damages was the amount of money paid by Giddens, Sheriff, for failure to deliver the negro at the time and place of sale; and that, therefore, unless it had been proved that the Sheriff had paid damages to said Turner, and Stallings and Persons, on their *fi. fas*, then no recovery in this action could be had on account thereof.

4th. Because, when said jury came in for further directions from said Court, said Court charged them, that if the Sheriff and defendants in *fi. fa.* did, after the expiration of sale hours on the day of sale, make an agreement to postpone said sale to a further day of sale, then such an agreement discharged the defendants from liability on said bond, notwithstanding the bond may, at the time of such agreement, have been forfeited, by a failure to deliver said negro within the hours of sale.

5th. Because the Court erred in refusing to let the witness, L. B. Smith, state the reply of the Sheriff to the witness when he, during sale hours, was urging the sale of the negro in controversy.

The Court after argument refused to grant a new trial, and plaintiff excepted, and now assigns said refusal for error.

B. HILL; A. G. PERRYMAN, for plaintiff in error.

JOHNSON & SLOAN; SMITH & POU and BETHUNE, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Upon a careful examination of the whole record, we feel constrained to award a new trial in this case. Without considering the alleged errors separately, we prefer to submit our views generally, upon the law of the case, as applied to the rights of the parties.

Assuming that the proof shows, that the negro George was not delivered on the day of sale, within the hours of sale, but that he was subsequently, and on the evening of the same day, placed in the hands of the Sheriff; and upon consultation with the attorneys of the creditors, it was agreed, that the sale should be postponed; and that by direction of Col. Towns, one of the counsel, the negro was allowed to remain in the possession of the defendants in execution, with the understanding that they should, within a week, give a new forthcoming bond, which they never did, but the negro was never sold, but run off to Texas—how stands the case?

The first bond was forfeited by the failure to deliver on the day of sale. Now, what took place afterwards was not necessarily a discharge of the bond. Expenses might have been incurred for the re-advertising, &c. The negro might have depreciated in value, so as not to have brought the amount of the *fi. fa.* on the next sale day. In that event, the surrender of the negro, and the postponement of the sale, would only go in mitigation of damages, and not in absolute discharge of the first bond.

There was error then in the holding, that the postponement, which was forced upon the parties, by reason of the first failure, would prevent any recovery upon the bond.

As to the right of the Sheriff to maintain this action, for the use of the three parties for whose benefit he sues, upon the doctrine of substitution, we think the action was well brought in behalf of Toliver Jones and Edward Giddens, the securities of the Sheriff, who were compelled to pay the execution of Ezekiel B. Smith. True, the Sheriff has paid nothing, and by reason of his insolvency—which the Court should have allowed to be shown—nothing could be collected out of him. But his securities have been forced to pay this liability for him. They are entitled, therefore, to be substituted to all the rights of their principal; and amongst the rest, that of suing on the forthcoming bond.

It is said on the argument, that the Court did not intend

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to exclude them; and counsel for defendants in error, do not seriously insist that they should be excluded. All we have to say is, that the judgment of the Court applied to the whole action. And the opinion of his Honor, accompanying the bill of exceptions, shows that we do not misinterpret his judgment.

But how is it, as to the Turner and Stallings and Perkins case? Their *fi. fas* were levied on the negro George also. And to prevent circuitry, instead of collecting their respective demands out of the Sheriff's securities, as did Smith, they propose to go directly upon the forthcoming bond. And it may be that, in principle, it is the same thing; and that, in equity, such a procedure would be sanctioned. But apart from the technical objection, that neither the Sheriff nor his securities, have any thing to pay on these claims, there are substantial reasons upon the face of the record, why this should not be done. To get the benefit of the testimony of James K. Giddens upon the trial of this case, he has been released by the creditors. He then has been discharged. Can his securities upon his bond be made responsible? It would seem not. And if no recovery can be had against the Sheriff or his securities, no action over can be had upon the forthcoming bond.

There is another stubborn fact disclosed upon the face of this record, which has not received that attention which its importance apparently deserves. After the negro George was again taken into custody by the Sheriff, it was agreed by one of the counsel for the creditors, or some of them, *in writing*, that he should be permitted to go into the possession of the defendants, the Evanses; and they were to bring the Sheriff another bond, for the delivery of the boy, that day week—that is, a week from the first Tuesday in July, 1844. Before that time arrived, the negro was run off to Texas, no bond was executed, and the Sheriff was unable to get hold of the property.

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Who is to suffer for this default? Not the Sheriff; for he was expressly authorized by the attorney, to suffer the defendant to take him immediately—trusting to them to give the bond afterwards. This being so, no action can be maintained against the Sheriff's securities, for the value of the negro or any part thereof, by Turner, or by Stallings and Persons. And in the face of this fact, we are unable to see how any judgment was obtained in favor of Smith against the Sheriff's securities. The defendants are entitled to avail themselves of this defence, against even the suit at the instance of the security upon the Smith debt. They should have pleaded it to that action.

If the testimony of Col. Levi B. Smith was admissible to prove that he urged the Sheriff to sell George on the day of sale, we are clear that the reply of the Sheriff should have been let in, in explanation of his conduct.

Judgment reversed.

BENNING J.—I dissent from the judgment in this case.

WILLIAM R. LOWE, executor of WILLIAM H. LOWE, deceased, and others, plaintiffs in error, vs. NANCY CODY, by her next friend, LEWIS HILL, defendant in error.

The wife has an equity to a settlement out of her share in her father's estate, until her husband's marital right has attached to that share.

In Equity, in Taylor Superior Court. Decision on demurrer, by Judge WORRILL, at April adjourned Term, 1859.

This was a bill filed by Nancy Cody, by her next friend, Lewis Hill, against Elias Cody, Freeman Walker, and Law-

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rence Walker, executors of Persons Walker, deceased, William R. Lowe, executor of William H. Lowe, deceased, Benjamin Cody, Thomas Carroll, and Lucius Q. C. M'Crary, Sheriff of Taylor County.

The bill states that Persons Walker, the father of Mrs. Cody, departed this life in the year 1854, leaving a will, (a copy of which is annexed and referred to,) in and by which Freeman Walker and Lawrence Walker, and Allen F. Owen were appointed executors; that said will was duly admitted to probate, and Freeman and Lawrence Walker qualified as executors, and received letters testamentary, Owen having renounced; that the executors took possession and control of the whole estate of testator, had the same inventoried and appraised, and kept the personal property together as directed by said will; that sometime during the year 1855, the executors sold all the lands belonging to said estate, except that devised to Mrs. Hannah Walker, and took notes from the purchasers for the purchase money, as they supposed was directed by the will; that in December, 1855, George W. Walker, one of the children of testator and legatee, became of age, and the executors sold the perishable property of testator, and also took notes for the purchase money; that the executors, all the legatees being of age and present, proceeded to make a division of said estate, and to pay out the same to the legatees, agreeably to and in pursuance of what they conceived to be the dispositions and provisions of said will; that in this division was included the notes held for the land and perishable property sold, as before stated; that the executors paid over to Elias Cody, the husband of complainant, and who had before that time been appointed her trustee, the sum of \$2,000, which amount was the share coming to complainant from the sale of said property, and which sum her said husband received from the executors, as the trustee of complainant; that with this \$2,000 thus received by her husband, he purchased a lot of land, two horses, a two-horse wagon, forty head of hogs, seven goats, and a bu-

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reau, which property complainant has been in the possession and use of since it was bought, and, with her husband and children, resides on said land, cultivating the same. The bill further states, upon a case recently coming up to the Supreme Court of Georgia, involving a construction of the will of said Persons Walker, said Court held and determined that he died intestate as to his land and perishable property, and that the executors should account for and pay over to the the heirs at law of deceased the money arising from the sale of said property. Said Court further held that the same was held by the executors as trustees for the heirs at law; that complainant, therefore, proposed to receive, as from said executors, the land and other property, purchased with the money paid by them to her husband, as her trustee as aforesaid, as her distributive share of said lands and perishable property, and prays that the same be settled upon her and her children, not subject to the debts of her present or any future husband. The bill further states that complainant's husband, the said Elias Cody, is utterly insolvent, and that said property has been levied on by the Sheriff of said county, by virtue of executions against her husband, and that they are attempting, and intend to sell said property to satisfy said *fi. fas.* The bill prays that said executors be enjoined as to said property.

It was further alleged, by amendment, that no provision, by settlement or otherwise, has been made for complainant and her eight children, and that the value of said property together with the negroes given to her by her father's will, did not exceed \$3,000.

To this bill defendants filed a general demurrer, for want of equity. The case was heard upon the demurrer, and after argument, the Court overruled the same, and defendants except and assign said decision as error.

GRICE & WALLACE, for plaintiffs in error.

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W. W. CORBETT, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court right in overruling the demurrer to the bill?
We think so.

It is plain that there was equity in the bill, if the marital right of Elias Cody, the husband of the complainant, Mrs. Cody, had not attached to the property turned over to him by the executors of her father's will. And his marital right had not attached to the property for one, if not for two reasons; first, he received the property not as his own, but as trustee for his wife, and, in that character, he gave to the executors a receipt for the property. This was really a renunciation, or waiver, of his marital right, as to the property; consequently, it prevented that right from attaching to the property. Secondly, the executors had no right to turn over the property, *under the will*, as the will did not dispose of it; consequently, it was not property to which the marital right could attach, but was property which, having been turned over by the executors, through mistake of the meaning of the will, they had the right to take back, to distribute under the statute of distributions. This, perhaps, is as good a reason as the first.

For one or both of these causes, the marital right of Cody had not attached to this property.

Consequently, there was equity in the bill.

Judgment affirmed.

Judge STEPHENS did not preside in this case, being detained at home by the illness of one of his children.

ROBERT B. HELMS, tenant in possession, plaintiff in error,
vs. **BENJAMIN MAY**, lessor, &c., defendant in error.

[1.] Adverse possession of land is notice of the holder's title to all persons who purchase during its continuance.

[2.] A sale of lands made in the face of an adverse possession is void.

Ejectment, in Stewart Superior Court. Tried before Judge KIDDOO, April Term, 1857.

This was an action in the ejectment form, by Benjamin May, lessor of John Doe, against Robert B. Helms, tenant in possession, and claiming to be the true and lawful owner for lot of land No. 239, in the 22d district of the first section of Stewart county.

This case was before this Court at June Term, 1858, and will be found reported in 26 *Ga. Rep's*, p. 132; the judgment of the Court below being then reversed by this Court, the case came up again for trial at April Term, 1859, of Stewart Superior Court, when plaintiff offered in evidence:

1st. A grant from the State to Green H. O'Bannon for the lot in controversy, dated 23d December, 1837.

2d. A deed from O'Bannon, by his attorney James R. Butts, to plaintiff, May, dated 20th November, 1855, and recorded 26th November, 1855.

3d. *Abram* ———, testified that he knew the O'Bannon lot, that Helms was in possession of it in January, 1855, and was now in possession; that there were twenty-five or thirty acres cleared; that defendant was in possession at the time May purchased it from O'Bannon; that sometime between 20th and 25th of November, 1855, he met plaintiff, May, at the depot in Macon; it was at night; May enquired of him if he knew lot two hundred and thirty-nine, in the 22d district of Stewart county; a vacant lot. Witness replied, that he did not know the lot by number, and that there was but one vacant lot in the settlement, and that was the Taylor lot

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which lay North of Mrs. Glenn's. May asked him if Helms did not live in that neighborhood, and witness answered that Helms lived on the lot north of the lot on which Spann's bridge was. May then asked if he knew the O'Bannon lot, and witness thinks he said to him, that was the lot, and wished to know how much it was worth. Witness told him that was the lot on which Helms was living, and was worth from four to five dollars per acre. From the conversation, witness was impressed with the belief that the Helms' lot was the lot May was enquiring about, and believed that there would be a lawsuit about it.

4th. *James Fitzgerald*, testified: That he knew the lot in question. Helms was in possession in 1856, and at the commencement of this suit. Not certain whether defendant was in possession earlier than 1856; there was about twenty-five acres cleared on the lot.

Here plaintiff closed.

Defendant then submitted the following evidence:

1st. A deed from O'Bannon the grantee to Deveraux Jarrett, for the lot of land in controversy, dated 5th November, 1833.

2d. A deed from the executors and legatees of Deveraux Jarrett, deceased, to defendant, for the lot in controversy, dated 17th October, 1854. Recorded 3d December, 1855.

3d. Defendant then read in evidence a deed from himself to William E. Paramour, to the west half of said lot.

4th. *William R. Mathis*, testified: That he knew lot No. 239, in the 22d district of originally Lee now Stewart county. Defendant went into possession of said lot in 1855, and had remained on it ever since; that he was in possession in November, 1855, at the time Benjamin May purchased it.

The testimony being closed, defendant requested the Court to charge the jury, as follows, to-wit:

1st. That if they believed from the evidence that the de-

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feudant was in possession of the lot of land in controversy, at the time May became the purchaser, that then the deed from O'Bannon to May was void.

2d. That if they believe from the evidence that Helms was in possession on the day that May purchased, then that possession was notice to May, and the deed to him from O'Bannon, although recorded in time, did not take precedence of the deeds from O'Bannon to Jarratt, and from the executors and legatees of Jarratt to defendant, notwithstanding they were not recorded in time. Which requests the Court refused to give in charge, but charged the jury, that if they believed from the evidence that defendant was in possession at the time May purchased from O'Bannon, that though that might be some notice to May, yet in order to give the deed under which defendant held said lot, priority over May's deed, May must at the time he took said deed, have had knowledge of Helm's possession.

To which charge and refusal to charge, counsel for defendant excepted.

The jury found for the plaintiff the east half of the lot, which were the only premises in dispute or controversy in this suit.

Whereupon defendant moved for a new trial, on the grounds of error in the charge, and refusal to charge, as above stated, and because the verdict was contrary to law, the evidence, and the charge of the Court.

The Court below overruled the motion and refused to grant a new trial and defendant excepts.

B. S. WORRILL, represented by B. HILL, for plaintiff in error.

E. H. BEALL, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We all concur that the Court ought to have charged as requested, that adverse possession of Helms when May's deed was made, was notice to May of Helms' title.

[2.] A majority of the Court, (I being one of that majority,) also think that the Court ought to have given the other charge as requested; that the adverse possession made May's deed void. I place my opinion not at all upon the much controverted statute of 32 *Henry VIII*, but solely on the common law. It seems to be conceded by both Judge McDONALD and Judge BENNING, in their elaborate and very able opinions on the opposite side of this subject, and it certainly cannot be successfully disputed, that by the common law no valid title can be conveyed to a thing, when there is an obstacle in the way of the purchaser's taking possession *according to the tenor of the deed*. A man cannot sell a lawsuit, nor the right of suing. Judge BLACKSTONE, in his 4 *Bk. Com.* 135, says, this is "one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; *because no man should purchase any pretence to sue in another's right*." Judges have often announced this principle from the Bench, and I repeat, that it seems not to be denied to be a principle of common law. But it is said first, that this principle of the common law was never in force in Georgia; and, second, that if ever in force, it has been repealed. I think the argument in answer to both these positions is very satisfactory. Without discussing the question, whether Georgia was settled as an uninhabited or as a conquered country, it certainly is a case where the settlers brought their own laws with them from England. In such a case, the rule, as stated by Judge BLACKSTONE, and as accepted without dispute in this discussion, is that the settlers bring with them, "*all the English laws then in being*." Such is the *rule*. The *exception* is, such of those laws as are inapplicable or inconvenient to

the new country. The principle that a sale is rendered void by an adverse possession at the time of making it, is within the rule; can it be shown to be also within the exception? Was that principle inapplicable or inconvenient to the settlement of Georgia? On the contrary, I think it had an applicability and a necessity here, far beyond what it had in England. I think the argument of Judge BENNING to show that the 32 *Henry VIII*, in its full extent, was inapplicable and inconvenient, is unanswerable. But this common law principle is a quite different thing from that statute, in all those features of the statute upon which he animadverts so powerfully and so successfully. That statute, with its provision that no sale of land should be good unless the vendor or those under whom he claimed, had been in possession a whole year next before the sale, would indeed have been a fatal obstruction to the rapid population and settlement of the wild lands of Georgia.

But no such objection can be successfully made against the common law principle under consideration. It would have been a bad thing indeed to have required purchasers to wait a whole year before they could buy, but it was an excellent good thing to require them to pass by all lands which they found already pre-occupied by an adverse holder, and push on to the great expanse of *unoccupied*, and therefore unproductive lands. Their obvious policy was not to encourage wrangling about settlements already made, but to stimulate the making of *new* ones; not to waste their time in the delays of the law, but to avoid controversy, that they might thrive by industry in an uncontested field. What they needed was not lawsuits, not *chances* for lands at the end of a long litigation, but *land*—land into which they could enter *immediately*, go to *work*, make provisions and raise families. The foundation and reason of this common law principle, was its morality. In addition to this reason, which lost none of its force by being transplanted from the old continent to the new, it was a matter of great importance to the new set-

tlers as a mere economy of *time*. Strange indeed and unwise would it have been, had these men cast aside a principle which, by preserving their time, and their means from being wasted in tedious and unprofitable lawsuits, must have contributed so much to the rapid occupation and early development of their new country. So strange and so unwise, that I do not believe it happened. Any reasoning which deprives those men of this part of the common law, takes away from them the whole body of it. I think, therefore, it is quite clear, that this principle was not excepted from that general body of the English laws which our ancestors imported into Georgia. But it is said it was repealed by the Registry Act of 1755. That Act provides that all deeds duly recorded shall prevail over prior but unrecorded deeds; and it is claimed that the force and effect of this provision is, that such recorded deeds shall be good, although made in the face of an adverse possession. This argument is bad, because it proves too much. As well may you say these deeds shall be good, although made in the face of a *fraud*; or in the face of the fact that the grantor was an idiot, and so incapable of contracting; or in face of the fact, that the grantor had no title, and so could not possibly convey one; or in face of any of the many causes which have in all times been held as fatal to the validity of deeds. The argument is, that *all* recorded deeds are to be good, *without excepting those made in the face of an adverse possession*. So are they all to be good, I reply, without excepting those which are procured by fraud, or those which are procured on an illegal consideration, or from an idiot or from a married woman; without excepting any of those causes which all mankind hold as blackening and avoiding all contracts whatever.

Now, my idea of that statute is, that it did not dream of conferring any new virtues upon recorded deeds nor of curing their defects, but simply intended to disable unrecorded ones, and remove them from competition with recorded ones. It never could have been intended to say that registry should

be a cure-all; to make a deed good which was against all the principles of the law. It was intended to leave the recorded deeds unaffected by the unrecorded ones, but not unaffected by law; to leave them in just as good condition as if the older unrecorded deeds were not in existence, but certainly not in any *better* condition. The whole scope of this Registry Act was to protect people against *secret* deeds. I do not think it was intended to make any deed good, nor to make any bad, except for the single cause of failure to register. I therefore think that this common law principle was not repealed by the Registry Act of 1755, but was of force on the 14th May, 1776, and so was formally adopted by our adopting Act of 1784. Nor was it repealed by the Registry Act of 1785, nor any subsequent Registry Act, for these are all open to the very same remarks which I have made on that of 1755. My conclusion is, that it now is, and always has been the law of Georgia, imported with the common law of England that a sale of land made in the face of an adverse possession, is void.

Judgment reversed.

JOHN BARFIELD, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] If there are two persons of the same name, and one of them signs that name to notes, with the intention that the notes may be used, in trade, as the notes of the other, it is forgery.

[2.] The 1st, 9th and 14th sections of the seventh division of the penal code, will, perhaps, each apply to the case of obtaining goods by passing a forged note. An indictment was founded on the 14th.

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Held, That as that was the latest section, and as the punishment it prescribes is the lightest, it, at least, was operative.

Indictment for obtaining chattels by color of counterfeit writing. Tried before Judge WORRILL, in Taylor Superior Court, April Term, 1859.

The substance of the testimony submitted to the jury on the trial of this case was as follows: On the 9th of March, 1859, the plaintiff in error, John Barfield, and Warren Barfield, went to the house of John Hudson, in the county of Taylor, and proposed to buy a mule from Hudson. Hudson declined to sell the mule, because it belonged to his son Roland. John Barfield then proposed to buy the pony of John Hudson, saying he had one hundred and fifty dollars in good notes on Slaughter Hill. Hudson asked Barfield if Slaughter Hill was the brother of Archer Hill (Archer Hill was known by Hudson to be a man of property.) Barfield answered that he was; but said that Slaughter Hill was worth five times as much as Archer. Upon this representation, Hudson sold Barfield his pony, and a cow and a calf, for the notes, as follows:

“§50. By the twenty-fifth of December next, I promise to pay John Barfield, or bearer, fifty dollars, for value received.

(Signed) his
SLAUGHTER ✕ HILL.
mark.

March 7th, 1859.”

“100. By the twenty-fifth of December next, I promise to pay John Barfield, or bearer, one hundred dollars, for value received.

(Signed) his
SLAUGHTER ✕ HILL.
mark.

March 7th, 1859.

These notes were, in fact, not the notes of Slaughter Hill, the brother of Archer Hill, but were signed by a boy who had no property, and who lived with Alex. Barfield. Slaughter Hill, the brother of Archer Hill, writes his name, and does not make his mark. This boy, Slaughter Hill, was not known by John Hudson. It was proven that John Barfield said that he and Alexander Barfield "had got in with the boy, Slaughter Hill, to give the note so he could buy a horse with it," and that Alex. Barfield was to give the boy, Slaughter Hill, a suit of clothes for signing the notes, and that he (John) was to keep the horse until fall, and then to sell him and divide the money with Alex. Barfield; that the object was to get Roland Hudson's mule, but as he could not get that he thought he had as well take old John's pony; that it was "a damned smart trick;" that somebody had to work for a living, and it had as well be old John as any one else; that he (John Barfield) had made one hundred and fifty dollars clear, and would not give his pocket-knife for the notes; and that if old Mr. Hudson would pay him for a week's work and one night's sleep that he had lost in devising the trick, he would let him have the pony back.

The Court, among other things, charged the jury, that to find the defendant guilty of the accusation contained in the bill of indictment, they must be satisfied that the notes, which had been read to them on the trial, had been shown to be forged and counterfeit. That if they believed it had been shown that the defendant procured the boy, Slaughter Hill, to make said notes, with the intent to use them to purchase property of the prosecutor, or any other person, by creating the impression, or inducing the belief that they were made by Slaughter Hill, the brother of Archer Hill, who was well known to be a man of property, when he knew that the boy was poor and without means, then the notes are forged and counterfeit, just as much so as if defendant had written the name of Slaughter Hill, the brother of Archer Hill, to them.

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Counsel for the prisoner asked the Court to charge the jury, that before the notes could be considered counterfeit, the jury must be satisfied from the evidence that the notes were not signed by a person named Slaughter Hill, but by the prisoner, or by some other person, without the consent of the party whose name appears to the notes. That if it was proven that a person by the name of Slaughter Hill did sign the notes, then the notes are not counterfeit letters or writings, and the case for the State is not made out, and the prisoner not guilty. That if the notes are genuine, and signed by a person named Slaughter Hill, it does not matter whether Barfield paid anything for them or not: which the Court refused to do; and thereupon the defendant excepted.

The jury found the prisoner guilty. At the same Term the counsel for Barfield moved for a new trial, on the following grounds:

- 1st. Because the Court charged the jury as stated above.
- 2d. Because the Court refused to charge as stated above.
- 3d. Because the offence charged in the bill of indictment is unknown to the penal code of this State.
- 4th. Because the verdict is contrary to law.
- 5th. Because the verdict is strongly and decidedly against the weight of evidence.

The Court refused to grant the new trial, and counsel for Barfield excepted, and now assign such refusal for error.

MAY; HUNTER, for plaintiff in error.

Solicitor General ELAM; GRICE & WALLACE; EDWARDS,
contra.

By the Court.—BENNING J. delivering the opinion.

The motion for a new trial embraces all of the exceptions in the case. The question, therefore, whether the Court be-

low was right in refusing that motion, will include all the questions in the case.

[1.] The first ground of the motion was the charge of the Court. That charge amounts to this: that if the defendant procured Slaughter Hill, the boy, to make the notes, with the intention to use them in the purchase of property, as the notes of another Slaughter Hill, the brother of Archer Hill, the notes were forged.

The evidence showed that the notes were made by Slaughter Hill, the boy; that he was not quite twenty-one years old; that he lived with a brother of the defendant; that he was destitute of property; that the defendant and his brother "got in with the boy Slaughter Hill, to give the notes, so he (the defendant) could buy a horse with them;" and that the brother was to give the boy a suit of clothes for signing the notes. It is clear from this that the boy was cognizant of the defendant's purpose to use the notes, as the notes of some other man than himself. There can be little doubt but that he knew that they were to be used as the notes of the other Slaughter Hill.

The charge must be construed in reference to these facts. It must, therefore, be treated as a charge to this effect: that if the defendant procured Slaughter Hill, the boy, to make the notes, with the intention to use them in the purchase of property as the notes of another Slaughter Hill, the brother of Archer Hill, *and the boy made them, cognizant of this intention*, the notes were forged.

The charge thus treated, the question becomes this: if there are two persons of the same name, and one of them signs that name to notes, with the intent that the notes may be used in trade, as the notes of the other, is the act a forgery?

And we think that it is, according to the authorities. These are, *Brown's case*, stated in *1st Archbold Pl. and Ev.*; *Mead vs. Yong*, 4 Term R. 28, 6 Cow. 72.

As to Brown's case, it was argued that it was distinguishable from the present in this: that the Brown there intended to be forged on, was a fictitious person. But that distinction rather makes against the party insisting on it—Barfield—for if it was a forgery to use the name of a fictitious person, how much more would it have been a forgery if the name used had been the name of a real person—of another real Brown.

The case of *Hevey*, (also stated in *Archbold*,) is not in conflict with these. In that case, Barnard McCarty was a real person; and the endorsement which he made, he made as his own endorsement. All that Hevey did was to *personate* McCarty, in reference to this endorsement.

We find no fault with the charge.

If the charge given was right, it is clear that the charge requested was wrong. The refusal of the charge requested was the second ground of the motion.

The third ground was, that the offence charged was unknown to the penal code.

This ground is, we think, not true. The fourteenth section of the seventh division of the penal code very plainly provides for the offence charged.

The fourth ground was that the verdict was contrary to law.

The seventh division of the penal code has three sections—the first, the ninth, and the fourteenth, each of which, perhaps, makes the facts stated in the indictment a crime. Those facts I can give only in general terms, the indictment not being, as I write, within my reach, it not having been sent up in the record, and the copy, or original, used at the argument of the case, not being now among the papers of the case. The facts were, however, in general terms, that Barfield, by color of forged notes, obtained a horse, and a cow and calf, from Hudson, with intent to defraud him. This statement is much the same, if not quite the same, as a statement to this effect: that Barfield, falsely and fraudu-

lently, *uttered, published, passed* the notes, &c.; and as a statement, that he *uttered and published, as true*, the notes, &c., of which statements the first would have brought the indictment under the ninth section; and the second would have brought it under the first section.

These things being so, it was insisted that none of the sections could be operative, and, therefore, that the verdict was contrary to law.

[2.] We think not. We think that even if the three sections are all alike, in the respect in question, yet that the one, at least, on which this indictment was founded, is operative; and for two reasons: that section is the latest, the punishment it prescribes is the lightest.

The fifth and last ground was, that the verdict was contrary to the evidence.

We think that there is nothing in this ground. The whole validity of the ground turns upon a nicety of expression in the indictment. The question is, whether the notes proved were the same as the notes described; and the question depends entirely on the import of an expression in the indictment. That expression I will not venture to try to recall by memory; and as the indictment itself is not at hand, I must let the decision on this point pass without stating the reasons for it.

None of the grounds appearing to us to be good, we must affirm the judgment.

Judgment affirmed.

Judge STEPHENS absent on account of sickness in his family.

Boon vs. Boon.

RATLIFF BOON, plaintiff in error, vs. **SION D. BOON**, defendant in error.

- [1.] New trial will not be granted on the ground that the verdict is contrary to the evidence, in a case where there is a conflict between a promissory note on the one side, and on the other a single witness who has a manifest bias in favor of the defendant.
- [2.] New Trial Act construed—new trial will not be granted by Supreme Court for any error except such as might have *hurt* the party moving the new trial.

Complaint, in Stewart Superior Court. Tried before Judge **KIDDOO**, at April Term, 1859.

This was an action by Sion D. Boon, plaintiff in the Court below, against Ratliff Boon, on a promissory note of which the following is a copy:

“\$250 00.

BASTROP, January 10th, 1853.

On the first day of April next, I promise to pay Sion D. Boon or bearer, two hundred and fifty dollars, for value received, with 8 per cent. interest from maturity until paid.

[Signed]

RATLIFF BOON.”

The facts of this case appeared, from the evidence, to be about these:

One Andrew L. Mott, Ratliff Boon's son-in-law, died in the State of Arkansas, and had in his possession a negro girl. Soon after his death, Sion D. Boon, who resided in Louisiana, went up to Arkansas and took possession of the girl, and carried her to his house; Ratliff Boon claimed the negro as his property, and plaintiff allowed him to take her, and this note was given by Ratliff to Sion D., either to indemnify him against any liability which he had incurred to, and which might be fixed upon him by the creditors of Mott, for intermeddling and taking possession and control of said negro, or as a compensation for the trouble, expense and risk which he might incur and run in the premises.

The jury, upon this proof, and under the charge of the Court, found for the plaintiff two hundred and fifty dollars, being the principal only of the note. Whereupon, counsel for defendant moved for a new trial, on the following grounds:

1st. That the Court erred in charging the jury, that if they believed from the evidence, that the defendant gave the note to plaintiff, in consideration that plaintiff should take the note and run all the risks, he might have incurred, to pay the debts of Andrew L. Mott, deceased, then they should find for the plaintiff the full amount of the principal of the note.

2d. That the Court erred in charging, that if the money was left to pay attachments, and plaintiff expended it in litigation, upon his own responsibility, it was improperly applied, and he ought to account for it; but if he litigated by direction of defendant, or applied the money to the payment of the attachments, then plaintiff is not liable for it.

3d. That the verdict was contrary to the charge of the Court, in this, that the Court charged the jury, that if they believed that it was the understanding and agreement of the parties, that plaintiff was to take the note sued on to indemnify him against the loss, trouble and expense he might be subjected to, by reason of his having intermeddled with Mott's estate, and was bound to notify defendant of such loss, trouble and expense, then plaintiff must show that he gave notice, and prove what had been his trouble, expense and loss, before he can recover.

4th. Because the verdict was contrary to law and the evidence.

The Court refused the motion for a new trial, and defendant excepted.

B. S. WORRILL, represented by B. HILL, for plaintiff in error.

E. H. BEALL, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] A new trial was asked in this case on the ground that the verdict was not supported by the evidence. We think it was. The *note* was a part of the evidence, and the verdict was in exact conformity with that. The only evidence against the note was, that of Mrs. Mott, a daughter of Ratliff Boon, with a pretty manifest bias in his favor. The *note* said that Ratliff Boon promised Sion to pay him two hundred and fifty dollars. *She* said he didn't promise to pay that sum, but only so much as Sion might lose by a risk he had taken for Ratliff's benefit. To decide the conflict was the peculiar province of the jury, and we will not disturb their decision. Another ground—that the verdict was contrary to the charge of the Court—resolves itself into this same one of being contrary to the evidence.

[2.] Another ground is, that the Court erred in the charge to the jury. We do not think there was any error which could have hurt the man who is complaining of it. But it was said, that under the New Trial Act of 1853-4, we must send the case back if there was any error in the charge, whether the error could have hurt the party complaining of it or not. We do not so understand that Act. On the contrary, it seems to be carefully worded in every branch of it, so as to require new trials only for such errors as are "against" the party moving the new trial. To be errors against him, they must be material errors—such as might have *hurt* him. We think the Judge was right in refusing the new trial.

Judgment affirmed.

WILLOUGHBY JORDAN, plaintiff in error, vs. **JAMES C. RIVERS**,
defendant in error.

A contract by one to let another have accounts to a certain amount off of books that are specified, gives that other a right only to select such accounts as he may please, and not to have good accounts at all events. He may have good ones if he can find them on the books; and there is no breach of the contract, unless this right of selection is refused to the promisee.

Motion for new trial. Decision by Judge KIDDOO, in Randolph Superior Court, May Term, 1859.

James C. Rivers brought suit in the Superior Court of Randolph county, against Willoughby Jordan, upon the following paper:

“CUTHBERT, August 28th, 1851.

This is to show, that I am to let James C. Rivers have the amount of one hundred and twenty-five dollars, in accounts which are on the books of Rivers & Jones, the same being in payment for the entire interest of said Rivers, in said firm.

(Signed,)

WILLOUGHBY JORDAN.”

Upon the trial, plaintiff gave in evidence the foregoing writing, and proved by one West H. Kirksey, that plaintiff and defendant met in his shop in the spring of 1852, to make a settlement. Defendant offered plaintiff some accounts. Plaintiff refused to take them unless defendant would endorse them, and said defendant was to give him good accounts. Defendant did not deny it, but said if they were not good, he would make them good. Witness does not know whether this conversation related to the subject matter of this suit or not.

Defendant then introduced evidence showing that Rivers sold out his interest in the grocery of Rivers & Jones to Willoughby Jordan, for the sum of one hundred and twenty-

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five dollars, to be paid in accounts from the books of Rivers & Jones. That Rivers was to take his own account, the account of M. D. Hendricks, and certain others, which amounted to the sum agreed on ; that he had more than once tendered Rivers these accounts, and that Rivers postponed drawing them off the books, or made some other excuse, for not taking them, at the times when the tenders were made.

Defendant further proved that Mastin D. Hendricks was, at the time of the trial on appeal, dead ; that in a former trial of this cause, said Hendricks testified, that he paid his account with the firm of Rivers & Jones, amounting to forty or fifty dollars, to James C. Rivers.

Plaintiff then introduced one witness who testified : That at some time in the year 1852, the witness made a conditional trade with Rivers for the receipt sued on ; that witness and Rivers called on defendant for a settlement ; that defendant handed them a bundle of accounts, and offered to let them take any account they wanted out of the bundle ; that there was no account in it on Rivers ; that defendant did not contend that any particular accounts had been agreed on between himself and Rivers ; and that the trade between witness and Rivers was not confirmed, because there were no accounts that witness would take. The partner, *Jones*, testified, that at the time of the trade between Rivers and Jordan, there were on the books more than two hundred and fifty dollars of good accounts.

The jury found a verdict in favor of the plaintiff for the sum of one hundred and twenty-five dollars.

After the verdict, the defendant moved for a new trial, on various grounds, all of which were abandoned in this Court, except that the verdict was "contrary to the evidence," and "against the weight of evidence."

After argument on said motion, the Court below refused to grant a new trial, and plaintiff in error excepted, and now assigns such refusal for error

Hood, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

The single question here is, was the verdict supported by the evidence? We think it was not.

The undertaking of Jordan was to let Rivers have accounts off of *the books of Jones & Rivers*. We think this implies that Rivers was to have the privilege of selection, to take good ones, if he could find them, but not certainly to have good ones, for at all events they were to come off of those books. There was no breach of the contract, unless Jordan refused to let Rivers have this privilege of selection. The evidence shows no such case, but on the contrary, the evidence is abundant and uncontradicted, that the books were frequently offered to Rivers for him to make his selection of accounts. Besides, there was uncontradicted evidence that Rivers had actually collected one of the accounts of forty or fifty dollars, and yet the verdict was for the whole amount.

As a new trial was refused, the judgment must be reversed.

Judgment reversed.

WILLIAM L. FRANKS, et al., plaintiffs in error, vs. DAVID B. HAMILTON, defendant in error.

A bond was conditional, to be void, if the obligors paid a note endorsed by the obligee, "so that, in no event, it" should "be collected, or attempted to be collected, from" him.

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Held, That a collection of the note, from him, or an attempt at it, was essential to constitute a breach of the condition.

Debt on bond. Tried before Judge LOVE, in Houston Superior Court, April Term, 1859.

Suit was brought, in Houston Superior Court, by David B. Hamilton, against William L. Franks and Clemenias J. Stephens, on a bond, in the sum of one thousand dollars, made by said defendants and payable to plaintiff. The bond was dated 23d September, 1852. The condition was as follows: That "whereas, Alexander W. Stephens, late of said county of Houston, and State of Georgia, but now deceased, did, in his lifetime, make and execute a certain promissory note of the amount of two hundred and fifty dollars, due 1st day of January, 1849, with interest from the 1st day of January, 1848, to the said David B. Hamilton, in part payment of a town lot in the village of Hayneville, and county of Houston, State of Georgia; and whereas, the said David B. Hamilton did endorse the said note, or otherwise become responsible for the payment of the said note to David Gunn, in his lifetime; now, if the said William L. Franks and C. J. Stephens do well and truly pay or cause to be paid, the aforesaid promissory note, so that, in no event, it shall be collected, or attempted to be collected, from the aforesaid David B. Hamilton, endorser as aforesaid, then this obligation to be null and void, &c."

Counsel for plaintiff read in evidence this bond; and then proved by Peter S. Humphries, that the note, referred to in the bond, had been placed in his hands for collection by the administrator of David Gunn; and that David B. Hamilton at that time, and now, lived in the State of Mississippi, or out of the State of Georgia.

Plaintiff then offered in evidence the note, defendants objected.

The Court overruled the objection, admitted the note and defendants excepted.

Plaintiff then proved that he had conveyed to Lunsford Pitts, the lot mentioned in the bond, and taken from Pitts a bond similar to the one made by Franks and Clemenina J. Stephens. Pitts conveyed the lot to defendants, upon their agreeing to substitute their bond for his.

Plaintiff then closed his case, and defendants moved a nonsuit. The Court overruled the motion, and defendants excepted.

The Court then charged the jury, that if the evidence showed that an attempt had been made to collect the note out of the plaintiff, that it was a breach of the bond by defendants, and the plaintiff had the right to recover damages to the amount of the principal and interest due on the note.

To this charge defendants also excepted, and now assign the same and the aforesaid rulings for error.

GILES, for plaintiff in error.

WARREN & GOODE, *contra*.

By the Court.—BENNING J. delivering the opinion.

Ought the Court to have granted the motion for a nonsuit? We think so.

We think, that the proof failed to show a breach of the condition of the bond. The condition was, that the bond was to be void, if the obligors paid the note, "so, that, in no event, it" should "be collected, or attempted to be collected, from" the endorser, Hamilton. A collection of the note from Hamilton, or an attempt at its collection from him, was therefore, essential to a breach of the condition. Does the evidence show either? It does not. It merely shows, that the note was put into the hands of attorneys for collection. It does not show, that the attorneys had collected it from Hamilton, or had attempted to do so. It rather shows the contrary;

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for it shows, that, when the note was put in the hands of the attorneys for collection, Hamilton was out of the State, a resident of Mississippi.

Judgment reversed.

JOHN V. PRICE, plaintiff in error, vs. ALLEN S. CUTTS, Sheriff,
and GEORGE A. BROWN et al., defendants in error.

- [1.] An agreement to execute a mortgage *in presenti*, the actual execution failing through inadvertence, does not constitute such a lien as will prevail against subsequent judgment creditors.
- [2.] The Sheriff, or one who acts as his agent, *pro hac vice*, is entitled only to his prescribed fees for keeping negroes, stock, &c., although he works them profitably, and brings the product of their labor into Court for the benefit of creditors.
- [3.] A person who collects funds of a debtor for the joint benefit of himself and other creditors, ought, when that fund is distributed by a Court of Equity, to be allowed reasonable compensation for the services of himself and lawyers, to the extent to which those services are productive and beneficial.

Motion to dissolve injunction, and to distribute money, in Sumter Superior Court. Decided by Judge ALLEN, April Term, 1859.

These were two motions heard and decided together by the Court below; one a motion to dissolve an injunction which had been granted at the instance of John V. Price, on a bill filed by him against William M. Brown, Gilbert C. Carmichael, George A. Brown, Henry H. Brown and Allen S. Cutts, Sheriff, and others; the other a motion to distribute money in the hands of the Sheriff, arising from the sale of certain property belonging to said George A. Brown.

Price alleged in his bill, in substance, that at November Term, 1857, of the Inferior Court of Sumter county, he obtained judgment against George A. Brown, who had absconded, in an attachment case sued out before that time; that William M. Brown, the father of said George A. and Gilbert C. Carmichael, and Henry H. Brown and said Gilbert C. Carmichael, late partners of said George A. Brown, under the name and firm of George A. Brown, also sued out their attachments against the said George A. Brown, which were levied one day before the attachment of complainant, and obtained judgments thereon at the same Term of the Inferior Court, to-wit: November Term, 1857; that said attachments were levied upon one thousand acres of land, thirty or forty negroes, about ten mules and horses, as the property of the absent debtor, and the total amount of the claims or demands, upon and for which said attachments issued, was twenty five or thirty thousand dollars.

The bill further charges that the attachment of Carmichael was for a debt or claim consisting of four notes purporting to be made by George A. Brown, payable to Henry H. Brown or order, each for \$2,072 32, and endorsed by Henry H. Brown and Gilbert C. Carmichael, and that said notes were given for and on account of the debts of the firm, composed of said George A. Brown, H. H. Brown and Gilbert C. Carmichael, under the name of Geo. A. Brown, as before stated, and that said Carmichael and H. H. Brown were equally bound as partners with George A. Brown for said notes.

The bill further charges that the attachment of Brown and Carmichael was founded on a debt contracted by said George A. Brown, for and on account of said firm, and that said H. H. Brown and Carmichael are equally bound as partners, each for one-third of said debt.

The bill further states, that complainant's attachment was founded on a debt *bona fide* due by said George A. Brown, and amounting to \$3,523 63.

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The bill further charges, that William M. Brown has received a large amount of money, notes and accounts belonging to his son, the said George A., and which he holds in his hands unaccounted for, and which should be applied to the claims of his creditors; that William M. Brown's attachment is founded on a bill drawn by him on the said George A. Brown, and accepted by the latter. Complainant charges that no cause of action accrued thereon to said William M. Brown, by reason of such acceptance.

The bill further charges, that the said Wm. M. Brown, acting or pretending to act as the agent of his son, after his departure from the State, received a large amount of money from the proceeds of the growing crop, and which he has failed to pay to the creditors of his son, or in any manner to account for; and also collected from the notes, accounts, &c., left belonging to George A. Brown, or to the firm aforesaid of Brown, Carmichael & Brown, a large amount, and which he has failed to pay to the creditors of said George A. Brown.

The bill further states, that said William M. Brown, as guardian for the children of his son George A. Brown, interposed a claim to five of the negroes levied on as the property of his son; that he has also interposed a claim in behalf of Mrs. Brown, for 13 of said negroes, and her father has also for her and her children, interposed a claim for 14 more of the said negroes; and the vendor of the land sold has also interposed *his* lien for the purchase money, amounting to over \$3,000, and all of said claims are now pending.

The bill further states, that the Sheriff has in his hands some ten thousand dollars, arising from the sale of George A. Brown's property, and which is claimed by the said vendor of the land sold, and also by William M. Brown, on executions older than those obtained in the attachment cases aforesaid, and which he has purchased and got the control of, and as the bill charges, purchased and bought by him with the money of his son, the defendant in these *fi. fas.*

The prayer of the bill was for an injunction to restrain the Sheriff from paying out the funds in his hands until the rights of the parties can be settled and adjudicated; that William M. Brown account for the proceeds of the crop, and the money collected on the notes, accounts, &c., belonging to the absent defendant, George A. Brown, and that he set forth fully the consideration and amount of all the judgments and demands which he holds; and that H. H. Brown and Carmichael do the same, and that the priorities of the claims of all parties be fixed by the decree of the Court, and the money in the hands of the Sheriff be applied accordingly.

Complainant filed an amendment to this bill, alleging that it was the agreement, and George A. Brown promised, in consideration that complainant would accept the draft for him, and which is the foundation of his claim, to execute a mortgage to him for five negroes, to secure and indemnify him for his liability incurred by said acceptance; that the mortgage was prepared, and complainant thought that the same had been duly signed, sealed and delivered, until afterwards, when he discovered that the paper handed to him by Brown as the mortgage agreed upon, had not been signed by him, and was unexecuted. He prays that said mortgage be set up, or that he be declared to have a lien upon the money in the Sheriff's hands, arising from the sale of the negroes, which were to be mortgaged to him as aforesaid.

Defendants answered the bill, Carmichael and William M. Brown denying any fraud, collusion or combination, as charged in the bill, setting forth the consideration of their respective claims and their amounts, all of which they allege to be founded on valuable consideration and *bona fide*. The partnership charged in the bill, is in effect, admitted by Carmichael.

William M. Brown denies that the old judgments against his son were bought with funds belonging to him, but

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that they were purchased by defendant with his own money, and with a view to prevent a levy of the same upon the plantation and negroes in the midst of the summer, and thereby breaking up its operations and preventing the making of the crop then growing; admits that he did interpose the claims mentioned, and made such arrangements as enabled him to keep the negroes on the plantation till the crop was made; and he makes an exhibit of his receipts and expenditures in relation thereto, and claims that the amount realized therefrom, he be allowed to apply to his judgments of junior date. He also claims that a reasonable sum be allowed to him as compensation for his care, trouble and services in managing said plantation, and in collecting the notes, accounts, &c. He also claims that a reasonable sum be allowed to his Attorneys, for advice and services rendered in the management of the affairs of the said George A. Brown. The cause was heard upon the bill and answers, and after argument, the Court ordered, decreed and adjudged:

1st. That the injunction be dissolved as to the fund in the hands of the Sheriff, the equities set up in relation thereto being fully denied by the answers; and that complainant has no claim or lien on said fund, or that portion arising from the sale of the five negroes, by virtue of the agreement between himself and George A. Brown, in relation to their being mortgaged to him; said agreement not having been executed.

2d. That the Sheriff retain the amount claimed by the vendors, in and under their bill now pending, being the purchase money unpaid, and to which they set up a lien as vendors.

3d. The Sheriff retain an amount sufficient to pay all costs.

4th & 5th. That the Sheriff pay out of the funds in his hands certain executions, (naming them) being the oldest liens, and about which there is no controversy.

6th. That William M. Brown credit on the four old *fi. fas.*

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owned and held by him, (naming them) the net proceeds of the crop made on defendant's, George A. Brown's, plantation in 1857, and also credit thereon the amounts received by him from the assets of George A. Brown, as admitted in his answer, and that the balance due on these *fi. fas.* be paid by the Sheriff, out of the funds in his hands.

7th. That he pay the tax *fi. fa.* amounting to \$38 68.

8th. That after paying the foregoing amounts, that the Sheriff pay the balance that may be in his hands, *pro rata*, to the *fi. fas.* of John B. Ross and others, (naming them) against said George A. Brown.

The judgments obtained in the attachment cases, being all of junior date, are not provided for in the above distribution; the older judgments at common law being more than sufficient to exhaust said fund.

To which order, judgment and decree, counsel for plaintiff excepted.

JAS. J. SCARBOROUGH; and C. ANDERSON, for plaintiff in error.

SAMUEL ELAM, for Carmichael; McCAY & HAWKINS, for Wm. M. Brown; LYON & IRWIN, and BUTLER, for Way & Taylor.

By the Court.—STEPHENS J. delivering the opinion.

1st. The case made by the original bill, so far as the defendant, William M. Brown, is concerned, is confessedly stripped of all its equity by the answer of Brown. It was so conceded in the argument, and the complainant relied only on his amended bill, setting up a mortgage which he alleges was, by agreement between him and George A. Brown, to have been executed by the said George A. at the time when the complainant's demand was contracted, but which failed of execution through some "inadvertence." There was a

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demurrer to this amended bill, and the question is, whether it is a good bill. Will equity set up this agreement against other creditors of George A. Brown? We think not. Equity will *reform* an instrument, but it will not *make* one. To make a case for relief, there must be an execution of *something*. Where the wrong thing is executed by mistake or fraud equity will, on sufficient proof, substitute the thing, which was really intended by the parties, in place of that which was executed by mistake or fraud. But to set up a contract where no execution of anything has been had, would be to make a contract, and not to reform one. Again, "inadvertence," without even saying whose inadvertence it was, is a new ground for equitable interposition. But, again, upon the principle that equity considers that which ought to have been done, as having been done from the beginning, the case which the complainant makes is that of an actual mortgage, (the aid of equity being sought merely to furnish and perpetuate the evidence of that which has existed all the time) and it cannot be maintained against subsequent judgments, as is asked to be done here, because it was not *recorded* within three months. The statute of 1827, *Cobb's Dig. page 172 and sec. 4*, is express that no mortgage, unless recorded within three months, shall prevail against any judgment obtained before the foreclosure of the mortgage. There was no foreclosure here, and indeed could not be. It was attempted in the argument to escape from this reasoning by saying this is not a mortgage, but an agreement for a mortgage, creating not a lien by mortgage, but a mere *equitable* lien. Cases were read to show that such an equitable lien is created by an agreement to execute a mortgage, but all these were cases where the mortgage was to be executed at some future day, not where the mortgage was to be had *in presenti*, but failed by mere want of execution. There is a difference, as it seems to me, between such a contract as equity will set up *as* a mortgage, treating it as having been a mortgage from the beginning, after it is set up on the one

hand, and on the other hand a mere agreement for a mortgage at a future time. The latter cannot be enforced, *as a mortgage*, for equity will not compel parties to form a written contract, merely because they have verbally agreed to do so without ever having attempted it. In the one case you have an actual mortgage existing from the beginning, not properly evidenced, to be sure, till equity, by its reforming hand, supplies the exact evidence, but still when so evidenced at last, relating back to the beginning, and counting as a *mortgage*, a *legal* statutory lien, and not a mere equitable lien. Now the case made by the complainant if it is anything, is the case of a *mortgage*, and it is not good against the judgment creditors, for want of record. The case of *Wall vs. Arrington et al.* in 13th *Ga. Rep.*, has been invoked as an authority for setting up this agreement as a mortgage. In that case a mortgage which had been executed, and duly *recorded*, was allowed to be corrected against judgment creditors, by striking out No. 109, and inserting No. 112; but there the number of the land was only a part of its description; the land really mortgaged was that which Wall had notoriously possessed for many years, and that was No. 112. The Judge, in that case, expressly says, "it was lot No. 112, and not lot No. 109, that was mortgaged;" thus treating the number as only a part of the description to be corrected by reference to other circumstances and marks of identity; and in that case the effect of our statute requiring mortgages to be recorded, was manifestly not discussed nor considered, and no case can be an authority for a doctrine not at all considered in it. The case of *Printup vs. Johnson*, 19 *Ga. Rep.*, has also been urged as an authority for the complainant. All that need be said of that case is, that it is no case of a *mortgage*. There are different kinds of liens, some legal and some equitable, some needing record, and others not; but we are dealing with a mortgage, and to hold such a lien good without record, would be to set the statute at defiance. The original bill having been fully met by the answer, and the

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amended bill being bad, we hold that the Court was right in dissolving the injunction as to William M. Brown. This is the only error of which the plaintiff in error complains, but by agreement two other parties were allowed to assign error.

2d. The firm of Brown & Carmichael assign as error under this agreement, the refusal of the Court to dissolve the injunction as to them.

We think the Court was right in this refusal. Their answer does not swear off the equity of the original bill, as to them, but on the contrary, in effect admits the partnership charged, and that the debt which they were seeking to collect out of George A. Brown, was not his individual debt, but one in which they were jointly liable, and equally interested with him. Their attachment had a precedence over that of the complainant by reason of its earlier levy, and it ought to be restrained from using that advantage, unless it is a *bona fide* claim. The injunction was rightly retained as to it.

3d. But William M. Brown also assigns error in the distribution of the fund which was turned loose by the dissolution of the injunction, and in refusing him compensation and attorney's fees, &c. He claims that he should have been allowed to apply the fund, which he had collected from the books, notes, &c., of George A. Brown, as a credit upon his younger attachment instead of upon his older *fi. fas.* We think not. To be sure there was no lien upon this fund, and the debtor, George Brown, might have applied it as he pleased, but he did not apply it all. The creditor also might have applied it, in the absence of any application of it by the debtor, but he too had failed to make any application of the fund, when equity laid its hand upon it. Equity having got possession of it, proceeded to apply it to the oldest liens first, and that was only following the law.

4th. He also complains that the Court erred in refusing him compensation for his services in making a crop with the negroes levied on. He claims in his answer, that he was acting as agent of the *Sheriff* in making this crop, and so he

was. But being agent for the Sheriff, he must stand in the Sheriff's shoes, and we are unwilling to lay down any rule of compensation for the Sheriff, except that prescribed by statute, that is to say his fees for keeping the negroes, &c. But in this case the negroes were kept out of their own labor, the result of the crop brought into Court, being the *net* proceeds after taking out all expenses, including the expense of keeping the negroes. We think there was no error in this particular.

5th. He also complains that the Court erred in refusing him compensation for his services and attorney's fees for services—to the estate of George Brown. We do not think he was entitled to compensation or attorney's fees, except for services in collecting the fund from the notes, books, &c. But for his services in collecting this fund which was for the benefit of all the creditors, we do think he was entitled to reasonable compensation, and to reasonable attorney's fees paid out in the collection of that fund. An allowance for attorney's fees for attending to the general interest of George Brown, was properly refused. Compensation ought to be allowed only for those services, which proved fruitful to creditors. As all compensation was refused, we are constrained to reverse the judgment, but it is reversed only on this last assignment of error, and reversed only to the extent stated.

Judgment reversed.

Howard vs. Reedy.

JOHN HOWARD, plaintiff in error, vs. WILLIAM REEDY, defendant in error. .

A possession originating in and continued under a mistake or misapprehension as to the true line which divides two lots of land, will not ripen into a statutory title.

Motion for new trial. Decided by Judge WORRILL, in Talbot Superior Court, March Term, 1859.

In August, 1855, suit was brought by William Reedy against John Howard, for the recovery of the south half of lot of land number 131, in the 22d district of Talbot county.

On the trial, the plaintiff offered in evidence several deeds, which showed a complete paper title to said half lot. He then proved that Howard was in possession of four and a quarter acres of said half lot, lying on the north side of the same.

Defendant proved by *George Hamil* that, in January, 1844, he occupied and claimed what he considered the north half of said lot, and that plaintiff occupied what was considered the south half; that the dividing fence extended only about half way across the lot, and at the time aforesaid, plaintiff staked the line for the fence the balance of the way, and (witness thought) laid the first rail of the fence a part of the distance. Witness laid the rest of the work, and had the fence built as close to Reedy's stakes as he could put it, until he reached near the end of the stakes, at which point he bent the fence southwards, for convenience in joining it to another fence. The gore thus made did not include as much as one eighth of an acre. This fence, when completed, extended all the way across the lot, and was understood by witness to be a dividing line between himself and Reedy. They made the fence as near the line of their respective halves as they could get it; witness believed it to be the true line, and thinks Reedy believed it to be the same. Witness occupied and

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cultivated the land on the north side of the fence, down to the fence, from the time of the division until he sold the north half of said lot, by deed, to Howard, in 1851. Witness never claimed more than half the lot of land; had a deed to half, and only sold Howard the north half. Witness claimed and occupied the ground on the north side of the fence, down to the fence, from January, 1844, until some time in 1851, when he sold to Howard. He claimed to the fence because he thought that the fence was the true line. After Howard and Reedy had disputed about the line, Reedy came to witness, and proposed to buy from witness the ground in dispute. Reedy said the ground belonged neither to him (Reedy) nor to Howard; that it belonged to witness; that witness had got it by possession. Witness replied that he did not sell Howard any more than the north half of the lot. Howard has cultivated and occupied the ground in dispute, from the time he bought the north half up to the present time; never heard Reedy say that the fence was the dividing line; witness thought it was the dividing line.

Defendant then proved by *Thomas G. Beach*, that Reedy once showed him the fence already mentioned, and told him that he (Reedy) and George Hamil run that fence for a dividing line between them; that Reedy staked it off, and helped to lay part of the worm.

Plaintiff then proved by *Sterling F. Grimes*, that Hamil sold to Howard in the fall of 1851; that soon after the sale Reedy proposed to Howard to reset the fence and put it on the line; that afterwards Reedy asked Howard why he had not complied with his promise to put the fence on the line, and Howard said he had directed his overseer to place it on the line, but the overseer had failed to do it.

Defendant plead the statute of limitations. The jury found a verdict in favor of the plaintiff for the four and a quarter acres in dispute.

Defendant moved for a new trial on the ground, that the

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verdict was contrary to law, and against the evidence. The Court below, after argument, refused the motion, and defendant excepted and now assigns said refusal for error.

SMITH & POW, for plaintiff in error.

BETHUNE; and PERRYMAN, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

We are unwilling to award a new trial in this case. There is proof sufficient to support the verdict, and the Circuit Judge has refused to disturb it.

There is no proof of any actual agreement between the parties, that the line actually run should be the dividing line between them, irrespective of the true line. The line was run under the idea, as we infer from the testimony, that it was the true line; and the occupation and claim of Howard was always based upon that ground. His possession, therefore, originated in, and continued under, a mistake or misapprehension as to the true boundary. Had he known the truth, we are warranted in believing that he never would have set up a claim to the four and a quarter acres of land in dispute. He never did claim title to but one-half of the lot. On the contrary, after he bought he recognized the paramount title of Reedy. He agreed, when he reset his fence, to put it upon the true line, and ascribed to his overseer the fault of failing to do so.

Judgment affirmed.

THE JUSTICES OF THE INFERIOR COURT OF LEE COUNTY, plaintiffs in error, vs. STEPHEN U. D. HUNT, JESSE M. DAVIS, et al., defendants in error.

Where the Justices of the Inferior Court issue execution against the County Treasurer, and his securities, improperly, *certiorari* is not the remedy—such Justices not being a Court.

Certiorari. Decision by Judge ALLEN, at chambers.

At the January Term, 1858, of Lee Inferior Court, Jesse M. Davis moved to set aside, as to him, a *fi. fa.* and judgment issued by the Justices of the Inferior Court of said county, when sitting for county purposes, in their own favor, as justices aforesaid, against Stephen U. D. Hunt, a former defaulting Treasurer of said county, and Turner Hunt, Daniel A. J. Sessions, Jesse M. Davis and Stephen R. Weston, his securities.

The grounds for said motion were as follows:

1st. That said judgment was obtained, and said *fi. fa.* issued, without any notice to him; and that he had no day in Court, nor any opportunity to object to the same.

2d. That the judgment is for a larger amount, by at least three hundred dollars, than was due to said county, by the principal in said bond.

3d. That said movant was liable on the said bond only as security for said Stephen U. D. Hunt, with the other securities thereto; that he signed the same, to a large extent induced by the fact that he saw the name of Turner Hunt thereto, and that he is informed and believes that said Turner Hunt never signed the same, nor authorized any one to sign for him, and that he is not therefore liable as security on said bond.

4th. That said bond was not taken or authorized by the Inferior Court, and was not a statutory bond.

On the calling of the motion, Davis asked the Court to submit the questions of fact heretofore set forth, to a jury-

The Court refused to submit them to a jury, but proceeded to hear and determine them for itself.

Davis proved by *Stephen Gay*, that he was Clerk of the Inferior Court at the time when the execution was issued. The Court (not at a regular Term) passed an order requiring Hunt to settle, as county Treasurer, with the Court, within ten days after notice of the order, as in default thereof an execution would issue against him and his securities. Hunt was served with a copy of this order, as an extract from the minutes. More than ten days afterwards, a judgment was passed, and the execution issued. No notices were issued to the securities. The bond, record and judgment were destroyed with the court-house.

Dr. Richardson testified, that he was a member of the Inferior Court of Lee county, at the time when Stephen Hunt was elected Treasurer. The election took place some time after the first Monday in January, 1853. Hunt was allowed a short time (perhaps a week) after his election to give the bond. The bond was not signed in presence of the Court; it was presented by the principal already signed, and was accepted by the Court. Davis's and Weston's names were not on the bond when it was first presented. The bond, without their signatures, was not satisfactory to the Court, and they signed it before it was accepted by the Court.

Wm. C. Gill swore, that he had seen the bond before it was burnt; had heard some doubts expressed about old Mr. Hunt's signature, but not until after the death of Stephen U. D. Hunt. Witness had examined the bond, with reference to that matter. Had seen Turner Hunt write at least three times; once he was drunk, and wrote a bad hand; on the other occasions he was rather sober, and wrote a much better hand. The signature to the bond was in some respects rather unlike Mr. Hunt's. He was an old man. In the opinion of witness, Turner Hunt did not sign it; he had doubts about it; the signature to the bond was "some" smoother hand than he had seen him write. Is the Sheriff

of the county, and as such has sold, since the death of Turner Hunt, some of his property, under this *fi. fa.* Jesse M. Davis bought it. Took a deed and took possession. Davis gave one hundred and ninety-five dollars for the land that was sold; the land is worth twenty-four hundred dollars.

After hearing the proof, the Court overruled the motion, and ordered that the *fi. fa.* proceed.

Davis then excepted to the decision of the Court, on the grounds:

1st. That the Court refused to submit the questions of fact connected with the motion, to a jury, but heard and determined those questions for itself.

2d. Because the Court having heard said proof, overruled the motion to set aside said judgment and *fi. fa.*

The Court then overruled these objections.

Davis, by his counsel, then petitioned for a writ of *certiorari*, which was granted by his Honor Judge ALLEN. To the granting of the *certiorari* the said justices, by their counsel, excepted, and in this Court assign the same for error.

F. H. WEST, for plaintiff in error.

MCCAY & HAWKINS, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

Certiorari is a remedy which lies only against a Court.

The Justices of the Inferior Court, in issuing execution against the county Treasurer and his securities, do not act as a Court. Their action is ministerial—as much so as the action of tax collectors in issuing execution against defaulting tax payers; and that this latter is ministerial, see *Tift vs. Griffin*, 5 Ga. Rep. 193, and *Bassett vs. The Governor*, 11 Ga. Rep. 217. They act as so many individuals. The very Act which confers this power upon them, discriminates between them and the Court, conferring this power upon the justices, or a majority, but conferring upon the Inferior Court,

eo nomine, the power to regulate the Treasurer's compensation. Again, I say, they are not a Court for another reason. My colleagues were not prepared to concur in it, but reflection has only confirmed me in it. I say, that part of the Act which confers this power, is unconstitutional; because it is a total departure from the caption of the Act. The caption is simply this: "An Act to appoint county Treasurers and define their duties." To issue an execution against them is a totally different thing from appointing them or defining their duties. You cannot *cover* it with the caption. You may appoint, and you may define duties, but you must do something else—something further and beyond what is expressed in the caption, before you can issue an execution—you must *enforce* duty. The constitutional prohibition is: "Nor shall any law or ordinance pass containing *any* matter *different* from what is *expressed* in the title thereof." The appointment is *expressed*, and the definition of duties is *expressed*, in the title, but the enforcement of duties is *not* expressed. Can any man say it is? To illustrate: Congress has power to "define *and* punish piracies and felonies committed on the high seas." Can any body say the power to *define* includes the power to *punish*? The framers of the Constitution of the United States thought not; they said define *and* punish, only because they must have thought that both ideas would not be *expressed* if either word was left out. Again, suppose this Act had gone on and provided that if the Treasurer should fail in his duties as "defined," he should be hung, would any body say this punishment was "expressed" in the title? that the caption covered it? To define is one thing, to punish is another, to enforce is another. The caption is to appoint and to define; it covers no *more* than these, and to push any thing more under it, can be done only on the principle, that where there is a will there will be found a way. This Act is the only one conferring the power of issuing execution against the Treasurer, on the Justices of the Inferior Court. If it fails here, it dont exist; and the justices

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in exercising it, not only do not act as a Court, but they do not act as a *legally constituted body*, and *certiorari* no more lies against their action, than it would against the unauthorized action of any other individuals. This is altogether a different case from a correction of an excess or usurpation of jurisdiction by a legal Court. Nothing is more common than the correction of such excess or usurpation in inferior *Courts* by *certiorari*. But here there is not only no legal Court, but no legal body. Whatever remedy then there may be, (and I cannot doubt there is one,) it is not *certiorari*. For a strong argument in favor of enforcing the constitutional prohibition here invoked by me, and for a strong analagous case to this one, see *Prothro & Kendall vs. Orr et al.*, 12 Ga. R. 36. The Judge having sustained the *certiorari*, his judgment must be reversed.

Judgment reversed.

PHILIP P. MONROE, plaintiff in error, vs. JOHN A. BISHOP, defendant in error.

Attachment does not lie on a promise to pay a certain amount in solvent notes, before such promise is due.

Attachment. Decision by Judge ALLEN, in Lee Superior Court, April Term, 1859.

On the 5th day of January, 1858, Philip P. Monroe sued out an attachment against John A. Bishop, on an instrument in writing, of which the following is a copy:

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"\$1,828. By the first day of January, eighteen hundred and fifty-nine, I promise to pay M. N. B. Outlaw, or bearer, eighteen hundred and twenty-eight dollars, in notes good and solvent, when this becomes due, with interest from date. The 29th day of December, 1856."

(Signed) "JOHN A. BISHOP."

Credit.

"Received, on the within note, eleven hundred and fifty dollars. January 4th, 1858.

(Signed) "P. P. MONROE."

At the April Term, 1859, of the Superior Court of Lee County, counsel for Bishop moved to dismiss the attachment, on the ground that it was founded on the foregoing instrument, which was an unliquidated demand.

The Court sustained the motion and dismissed the attachment, whereupon plaintiff excepted, and now assigns the same for error.

HAWKINS, for plaintiff in error.

WEST, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

This Court, in the case of *Mills vs. Findlay*, (14 Ga. Rep. 230,) laid down the rule that, attachment would lie only for *money* demands. Nor does the Act of 1857 change this rule, for it is expressly confined to *money* demands. Now a promise to pay a certain sum *in notes*, is not and cannot be an obligation to pay *money*, until, at least, there is a failure of a promise to pay notes. If the promisee has a money demand, then, of course, he can insist on payment in *money*. Nothing but coin would be a legal tender to him; but here

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he is bound to accept notes, when the promise falls due. This test shows that such a promise does not give a money demand, at least not till *after* it is due. Here the promise was not due, and we think the attachment was properly dismissed.

Judgment affirmed.

JOSIAH A. ROBERTS, plaintiff in error, vs. HOCKLEY C. MCKEE, defendant in error.

One member of a firm, after the dissolution of the partnership, will be restrained from publishing letters written to him by another member in the course of their business, and appertaining thereto, without the consent of the writer; it not appearing that the purpose of justice, civil or criminal, required the publication.

In Equity, in Muscogee Superior Court. Decision on demurrer by Judge WORRILL, May Term, 1859.

This was a bill, filed by Josiah A. Roberts, against Hockley C. McKee, to enjoin and restrain the exhibition and publication of certain letters written by complainant to defendant.

The bill states that in the years 1857 and 1858, complainant was a partner with defendant and his son, John McKee, in the business of buying and selling carriages, &c., in the city of Columbus, under the firm of McKee, Roberts & McKee. That said partnership was dissolved in September, 1858, and defendant retained all the books, papers, and correspondence belonging to said firm. That they did a large credit business, and complainant being the active member of the firm,

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it became his duty to enquire into the standing and credit of persons trading with them. That defendant, who was the senior partner, was often absent, and complainant was in the habit of writing letters to him, informing him of the pecuniary standing and responsibility of persons doing business with their house, or desiring to do so. That he thus frequently wrote to defendant confidential letters, in relation to the character of many persons, with no other view, and for no other purpose than to subserve the interest of the house, and to keep the partners advised of the condition of the business, and the standing and credit of its customers.

The bill further states, that since the dissolution of said firm, defendant, in violation of the confidence reposed in him, and for the purpose of *involving him in serious and personal* difficulties, has exhibited the letters aforesaid, or a portion of them, to persons in the city of Columbus, and is threatening to give publicity to said letters, for the purpose of injuring complainant, and with no view to benefit the business of said firm.

The bill further states, that complainant has good reason to fear that the publishing of said letters will involve him in litigation or serious personal difficulties, to his great damage and injury, if defendant is not enjoined from making known or publishing the contents thereof.

The bill prays, that defendant be enjoined and restrained by the order of the Court, from exhibiting or publishing said letters, or making known the contents thereof.

The bill received the sanction of the Chancellor, and an injunction issued agreeably to the prayer thereof.

Afterwards, and during the May Term, 1859, of the Superior Court of Muscogee County, defendant, by his solicitor, moved to dismiss said bill for want of equity.

The Court, after argument, granted the motion and dismissed the bill, and complainant excepted.

W. DOUGHERTY; and MOSES & LAWES, for plaintiff in error.

HOLT & HUTCHINS, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The question in this case is one of novelty in our Courts; and I approach it with a full sense both of its delicacy and importance.

To give publicity, wantonly, to confidential correspondence, meets with the prompt rebuke and merited condemnation of every one not lost to all honorable feeling. It is a death-blow to the best interests of civilized society itself, as well as to all the endearments of family and social intercourse. While all this is fully admitted, the issue to be met and decided is, are Courts of Equity clothed with power to interpose and grant relief in such cases?

Judge Story, upon a review of the authorities, has come to the conclusion that the restraining process of a Court of Equity may be invoked to prevent the publication of mere private letters on business, or on family concerns, or on matters of personal friendship, as well as those which fall within the line of literary compositions. 2 *Story's Eq. Jur. sec's* 943, 944, 945, 946, 947, 948, 949.

And conceding that Courts of Equity act alone upon the principle of protecting the rights of property, and not upon the grounds that such publications tend to wound the feelings, to degrade or injure the author, and to expose him to personal abuse and litigation, or to disturb the peace of society, still we think the jurisdiction can be sustained, on one broad and comprehensible ground at least; and one which, when announced, will tend greatly to promote confidence—the only solid foundation upon which society rests—by taking away the temptation to its betrayal. It is the principle announced by Lord Eldon, in *Gee vs. Pritchard*, (2 *Swanston Ch. Rep.* 403,) and that is, by sending a letter, the writer has given, for the purpose of reading it, and in some cases of keeping it, a property to the person to whom the letter is

addressed, yet that the gift is so restrained, that beyond the purposes for which the letter is sent, the property is in the sender.

Is then the publication of the letters written by one of these partners, to his copartner, necessary to the winding up of the business of the concern, or even to the proper vindication of the rights of the defendant; or, in the language of some of the cases, do the purposes of justice, civil or criminal, require their publication? If so, it may be that their publication was impliedly involved to that extent at the time they were written. They were intended to influence the conduct of McKee. If they had that effect, and he has thereby exposed himself to injurious imputations, self-vindication, it would seem, would entitle him to use these letters, even without the consent of the writer. A mere suggestion or representation by McKee that their publication was necessary for that purpose, would not be sufficient. The affidavit filed by William Pritchard, in the case in *Swanston*, to dissolve the injunction, presented a very plausible case. It alleged that the plaintiff, by withdrawing her regard and esteem from him, and treating him in the injurious manner therein represented, reports and suspicions prevailed in his neighborhood that he had been guilty of some gross acts of misconduct; and that he was greatly lowered in the estimation of many of his parishioners, (being rector of Walton on the Hill,) and that hence he felt it necessary to publish the correspondence between Mrs. Gee and himself, to be circulated privately, and not with a view of profit to himself or to gratify any vindictive object or motive of resentment toward Mrs. Gee. But all this, and much more, would not suffice, in the opinion of the Chancellor, to break the seal of confidence under which the letters, threatened to be published, were written.

If such be the rule, with what pretence can it be urged that any one has the right to spread private letters before the world, merely to gratify personal enmity or revenge, and

thereby subject the writer to injury and abuse; or to administer to a depraved public appetite? And delicate as the duty is, we believe the Courts ought not to hesitate to interpose and protect the writer, as well as the peace and good order of the community, against such attempts. Let the letters themselves be produced and exhibited to the Chancellor, to be examined by him upon the hearing of the motion to dissolve the injunction, and otherwise he will be unable to decide intelligently in the premises. He should see to it in the meantime, that the correspondence is not brought surreptitiously before the public, under the pretext of making it a part of the pleadings.

It is insisted by our young brother Hutchins, that the text in Story is not supported by the cases which he cites, and he has submitted an able and ingenious criticism upon the authorities, to establish his position. But what was the point decided in the leading English case upon this subject? viz.: *Gee vs. Pritchard*, 2 *Swanston's Ch. Reports*, 403, a case thoroughly argued by such counsel as Wetherell and Sir Samuel Romilly, and in which all the previous adjudications were carefully sifted and scrutinized? It was this: that a Court of Equity has jurisdiction to restrain the publication of private letters, on the ground of a qualified right of property in the writer; and that there is no distinction between private letters of one nature and private letters of another nature. And we look upon that case as sustaining, to the fullest extent, the propositions laid down by Judge Story, and the triumphant vindication of the great principles of public policy and sound morality, upon which the doctrine is founded. And if the Courts have resorted to a mere device for this purpose, namely, the idea of property, in whole or part, in the writer, they are justified by a similar practice in other cases. In an action, for instance, for the seduction of a daughter, the plaintiff comes into Court as a master, suing for the loss of service of his servant; but goes before the jury

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as a father, to claim damages of the defendant for the dishonor and ruin brought upon his daughter and family.

I would add, in conclusion, that but few subjects would be more attractive than the correspondence of some large banking and business house, of any description. Suppose it were announced that there was "in the press, and speedily to be published, the business correspondence of the Rothschilds," would not expectation be on tiptoe? We do not suppose that the business letters of Messrs. "McKee, Roberts & McKee" would be quite so eagerly looked for, yet, I dare say, it would find as many readers as many of the professed literary works of the present day. These letters may be valuable as *property*.

Judgment reversed.

Judge STEPHENS absent.

LINDSEY H. DURHAM AND WIFE, plaintiffs in error, vs. SETH K. TAYLOR, executor, defendant in error.

- [1.] If the proof to rectify a written contract, is sufficient to satisfy a jury beyond a reasonable doubt, it is as much as is necessary.
- [2.] A written marriage contract is subject to be rectified by the verbal contract which it was to reduce to writing, in every case in which not allowing it to be so rectified, would be to allow one of the parties to it, to perpetrate a fraud on the other.
- [3.] One witness and circumstances sufficient to give a clear preponderance against the answer, will suffice, to overcome the answer.

All the facts necessary to a full understanding of the points adjudicated in this case, are embodied in the following opinion of the Court.

HAWKINS, STROZIER, SLAUGHTER, and LYON, for plaintiff in error.

MORGAN; and ROBINSON, *contra*.

By the Court.—BENNING J. delivering the opinion.

Did the Court below err, in refusing the motion for a new trial? We think so; we think, that some of the grounds of the motion, were good, which these are, will be seen, as the grounds are disposed of.

The first ground was as follows: "The Court erred in charging the jury, that the proof necessary to reform a marriage contract, must be *indubitable*; and, in the further part of the charge, in saying, that it required irrefragable proof."

[1.] Proof that is sufficient to satisfy the jury beyond a reasonable doubt, is as much, we think, as is necessary; such proof is sufficient to justify a verdict of murder, and, the consequent taking of human life; such was the proof recognized, if not decided, to be sufficient, in *Wyche and wife vs. Greene*, (16 Ga. 63)—a case for rectifying a deed, on parol evidence.

"Irrefragable," "indubitable," proof, is proof of a degree beyond this.

This ground then, we think, was good.

The second ground was as follows; "In charging, that if the marriage contract is reduced to writing, before marriage, containing the intention of the parties, it cannot be altered or amended, afterwards, under the statute of frauds."

It is certainly true, that the writing, if it expresses the "intention" of the parties, will be free from liability to be altered or amended; but the statute of frauds, was not needed to give to it, this exemption; there never was any law allowing a writing to be so "altered" or "amended," as to make it cease to speak the "intention" of the parties to it; and that would be the effect of any alteration or amendment of a

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writing, if the writing, expressed, the "intention" of the parties.

We see nothing amiss, in this ground, as the ground stands expressed.

The charges in the third, fifth, and seventh grounds, are nearly related. Those three grounds, therefore, will be taken up one after another.

The charge contained in the third ground, amounts to this proposition; that a written agreement is not to be corrected by any verbal agreement made prior to it, or contemporaneous with it. Is this proposition true?

It is a proposition of wide extent; it does not except cases of fraud; it is equivalent to this, that, in no case, is a written contract, to be corrected by a verbal one, not even in the case in which, not to allow the correction, would be to permit one of the parties, to perpetrate a fraud on the other.

But the contrary of this, has been held by this Court, in several cases, and, especially, in the case of *Wyche and wife vs. Greene*, (16 Ga. 49.) In that case, the decision was, that the written agreement was to be corrected by the verbal agreement, and the case was one in which, not to have allowed the correction, would have been, to permit one of the parties, to perpetrate a fraud on the other. (And see *Browne and wife vs. The Savannah Mutual Insurance Co.*, 24 Ga. 97.)

This decision, the counsel for defendant in error, do not question; they, consequently, admit, that the proposition is not true of some of the cases which it covers. But they say, that the decision does not apply to the present case; they say, that that case was not within the fourth section of the statute of frauds, and, that this is the reason why the decision was right; and they say that the present case is within that section, and, therefore, that the same decision would not be right in the present case. Their argument may be thus stated. The statute of frauds says, that, "No action shall be brought whereby, to charge" "any person upon any" verbal "agreement made upon consideration of marriage." If

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no action is to be brought on "any" such verbal agreement, then none is to be brought on such a verbal agreement, even in the case in which, not to allow one to be brought on it, would be to permit one of the parties to it to perpetrate a fraud on the other; consequently, even this extreme case, is not excepted from the operation of the statute. The bill, in the present case, is "an action" brought, first, to correct a written marriage contract, by the verbal contract which preceded it; and, secondly, to enforce the written contract, when corrected by the verbal. The written contract, when thus corrected by the verbal, will, in reality, be only the verbal. Therefore, the action is, in reality, an action to enforce the verbal. Consequently, it is an action which, the statute says, shall not be brought, even though it might be true, that the case were such, that not to allow it to be brought, would be, to permit the defendant or his testator, to perpetrate a fraud on the plaintiff. However, it is not true, that the case is such a case as that, and therefore, the case is not excepted from the statute, even if that case is. This is their argument.

Is this a good argument?

And first, is it true, that the meaning of the statute, is, that not, in any case, can a marriage contract reduced to writing, (or any of the other contracts mentioned in the fourth section of the statute,) be corrected by the verbal contract which preceded it—not even in a case in which, refusing the correction, would be allowing one of the parties, to perpetrate a fraud on the other.

Does the statute mean this?

It certainly does not, if decisions are the test of what it means. They say, that it had for its main object, the suppression and prevention of frauds; and, therefore, that, when it interferes in a case of fraud at all, it interferes against the fraud; that, it never interferes in a case of fraud, to aid and protect the fraud. The principle they affirm, may, for practical purposes, be thus expressed; fraud takes any case out of the statute of frauds. And it is not necessary, that this

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fraud should be actual positive fraud; if it be constructive fraud, that will be sufficient; for example; if one of the parties to a verbal contract relating to land, has done certain things in part performance of the contract, and the other refuses to perform his part of the contract, his conduct will be construed to be, the result of an original fraudulent design, and he will be compelled to perform his part of the contract.

The decisions go further; they say, that if, by *mistake*, a writing fails to express the contract as verbally made, the writing will be rectified, so that it shall express the contract as verbally made. Perhaps, however, the refusal to correct a plain mistake, is, itself, to be construed into a fraud.

In short, what the decisions say, is, that the written contract is to be corrected by the verbal which preceded it, in every case in which, not to allow it to be so corrected, would be to permit one of the parties to it, to perpetrate a fraud on the other; and, in every case in which, the failure of the written contract, to accord with that verbal one, was occasioned by a plain mistake. To show that this is so, some of the decisions will now be briefly stated, and others, be named.

First, however, I will refer to a very large class of cases, without naming one of them, the class in which there has been a part performance of the contract. These, it is held, are not within the statute. (1 *Sug. Vend.* 200.) And why? Because in them, not to hold the nonperforming party bound, would be to permit him to practice a fraud on the performing party. It is fraud then, that takes these cases out of the statute, and they are a host in themselves. And if fraud is sufficient to take them out of the statute, why is it not sufficient to take any case out of the statute?

And is there any good reason why, marriage should not be considered a part performance of a marriage contract, so as to take that contract out of the statute? The reason assigned in *Montecute vs. Maxwell*, (1 *P. Wms.* 618) is, that, until the marriage, the promise is not within the statute at all. True, the words of the statute, are, "upon consideration of

marriage," not, of a promise to marry. But if we say, that these words mean only cases in which marriage already taken place, is the consideration, we exclude all cases of ante-nuptial marriage contracts; and, it seems to me, that we must say, they mean this, if we say, that, until marriage, the agreement is not within the statute. But who will say, that they mean this? Besides, if an ante-nuptial agreement is not within the statute before the marriage, how can it be so afterwards? The consideration of an ante-nuptial agreement, is, *a promise* to marry. That remains the consideration, after the marriage. The marriage is the performance of the promise, not its consideration. By the marriage, then, the agreement does not cease to be an agreement in consideration of a *promise* of marriage, and become an agreement in consideration of *marriage*. How, then, can the marriage draw the agreement within the statute, if it was not there before? Certainly, we may admit, that, if it took part performance, (marriage,) to draw the case within the statute, it would appear absurd to say, that that same part performance should draw it out.

What say justice and equity? Do they not say, that these cases of marriage contract, are often the very ones which marriage, as part performance, ought to take out of the statute? In the other cases, the injured party, if he has parted with his property, in performance of the contract, and that fails, may recover it back; but, in these cases, if the wife has parted with her property, and the contract fails, that property is gone; the moment the contract gets out of the way, the marital right of the husband steps in, and swallows it all, at a mouthful.

Nay all of her rights are gone; she has become a married woman, and thus has merged in her husband; and his conduct, in repudiating the contract, is not even a ground to her, for demanding a divorce. Indeed, a divorce, if she could obtain one, could not restore her, to all she was, if it could, to all she had, before the marriage. Great and irre-

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parable is the mischief, if the contract be held void. I myself, therefore, much doubt whether, in cases of this kind, marriage is not such a part performance as takes them out of the statute.

I will now briefly state some cases and mention others.

"There was a verbal agreement for an absolute conveyance of land, and for a defeasance to be executed by the grantee; but he having obtained the conveyance, refused to execute the defeasance and relied upon the statute; but his plea was overruled and he was compelled to execute according to the agreement." *Brown on Stat. Frauds* §. 441; *Citing Vin. Abr.* 523-24.

This was a case which happened in Lord Nottingham's time, soon after the passage of the statute. It has been followed by many cases. (See 1 *White & Tudor Eq. Cases* 663 *top.*) With us it took a statute, to break this current of decisions—the statute of 1837, 'to regulate the admission of oral evidence' "in certain cases." That statute itself, however, goes no further, than to restrict the parol evidence. It confines its use to showing "the fraud only."

"In *Pember vs. Matthews*, a bill was filed for a specific performance of a parol agreement, by a purchaser of a lease under written conditions, to indemnify the vendor, against the rent and covenants; and it was objected, on the part of the defendant, that the evidence was inadmissible, upon the ground, that where the parties have entered into a written agreement, no parol evidence can be admitted to increase or diminish such agreement. The rule Lord Thurlow said, was right; but where the objection was originally made, and promised by the other party to be rectified, it comes amongst the string of cases where, it is considered as a fraud. Then the evidence is admissible. There being some doubt as to the fact, Lord Thurlow ordered it to go to law, upon an issue, whether there was such a promise on the day of the execution of the agreement. Upon the trial the jury found, there was such a promise; and the

plaintiff had a decree for a specific performance. 1 *Sug. on Vend.* 270, *Citing* 1 *Bro.* 66, 52. This case still stands— notwithstanding any thing said by the Master of the Rolls, in *Clark vs. Grant* 19. *Ves.* 24.

Similar in principle, and quite as strong, are *Coldcat vs. Serjeant Hyde*, 1 *Ch. Ca.* 16; 1 *Sug. Vend.* 262; *Fielder vs. Studley*, 1 *Sug.* 20; *Thomas vs. Davis*, 1 *Sug.* 264; *Rob. vs. Butterwick*, *Sug.* 265; *Leak vs. Morrice* 2 *Cas. Ch.* 135.

Also all those cases in which, it has been held, that “if a man procure a certain devise to be made to himself, by representing to the testator, that he will see it applied to the trust purposes contemplated by the latter, he will be held a trustee for those purposes.” *Brown on Stat. Frauds*, *citing Harris vs. Howell*, *Gilb. Eq. R.* 11; *Chamberlaine vs. Chamberlaine*, 2 *Freem.* 34; *Devenish vs. Buines*, *Prec. Ch.* 3; *Oldham vs. Litchford*, 2 *Vern.* 506; *Flynn vs. Flynn*, 1 *Vern.* 296; *Hoge vs. Hoge*, 1 *Watts Pa.* 163; *Burrow vs. Greenough*, 3 *Ves.* 151, *as contra.*

In these cases the promise is verbal; and is a “contract” “of lands, tenements, hereditaments, or,” an “interest in or concerning them.” (See words of the statute.)

The case of *Cookes vs. Mascall*, 2 *Vern.* 200, is thus stated in *Brown on the Statute of Frauds*, *sec.* 443. “A marriage was about to be celebrated between the plaintiff and defendant’s daughter, and the Solicitor on behalf of the plaintiff was in the course of preparing articles of settlement; and in the meanwhile a disagreement arose as to the articles, but the plaintiff was still allowed to come to the defendant’s house, and afterwards married his daughter, the defendant being privy to it, helping to set them forward in the morning, and entertaining them, and seeming well pleased with the marriage upon their return to his house at night; he was decreed to execute the agreement according to what had been drawn up by the Solicitor, though it had not received his signature.”

Here, if there was any promise at all by the father, to

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execute the articles, it was but a promise in law—a promise by construction, and that certainly was a thing hard to make out, in the face of his objecting to the articles, yet he was compelled to execute them. In our case the husband most solemnly promised to make the marriage contract right.

In the same work, the striking case of *Montacute vs. Maxwell*, is thus stated. "In *Montacute vs. Maxwell*, as appears from one of the reports of that case (1 *Eq. Cas. Abr.* 19,) the defendant having given instructions to have a marriage settlement drawn, privately revoked those instructions, and persuaded the plaintiff to marry him; and he was decreed to execute the settlement, the Lord Chancellor as stated in still another report of the case (*Prec. Ch.* 528) asserting the rule to be that if the parties rely wholly on the parol agreement, neither party can compel the other to the specific performance, for the statute of frauds is directly in their way; but if there is any agreement for reducing the same to writing, and that is prevented by the fraud and practice of the other party, the Court would in such case give relief; as, where instructions are given and preparations made for the drawing of a marriage settlement, and before the completion thereof the woman is drawn in, by the assurances and promises of the man to perform it, to marry without a settlement." *Brown Stat. Frauds, sec.* 445.) See first of *Strange*, 236, for another report of this case.)

Other cases of marriage contract in which, a specific performance was decreed, are the following: *Mullet vs. Halfpenny*, 1 *Eq. Cas. Abr.* 20; *Baudes vs. Amherst* *Prec. Ch.* 404; *Young vs. Young* 1, *Dickens* 295, *Cited*; *Rogers vs. Earl*, stated in 1 *Sug. Vend.* 264.

These are enough; they show, if decisions can show it, that the statute of frauds does not mean to say, that a written marriage contract, or other of the contracts within the fourth section of the statute, is not to be reformed and corrected, by the verbal contract which preceded it, whenever, not to allow

the correction, would be, to permit one of the parties, to perpetrate a fraud on the other. They show, in short, that fraud takes any case out of the statute. On the question, what will, or will not, make a case of fraud, there will, I admit, be a difficulty in reconciling all the decisions. But, once grant, that the case is a case of fraud, and they all agree, that it is out of the statute.

This being the interpretation of the statute, by the decisions, are we not bound by it, even although, it may be true, that the statute, taken by its letter, is susceptible of a different interpretation, perhaps requiring a different interpretation? We think so. These decisions started with the statute, they traveled with the statute, they have reached us with the statute. Having thus run with the statute in so long a journey—almost through centuries—they ought, at length, to be considered as having grown to the statute, and as now making a part of it.

Even if the statute were a new statute, I should doubt whether it could take any other construction, in cases in which, the agreement has been reduced to writing, but incorrectly reduced to writing, and the effort is, to have the writing corrected, and enforced as corrected. The statute says that the agreement, or "some memorandum or note thereof," shall be in writing. Now when an agreement is corrected, is it not still the same agreement? Has it lost its identity? Does patching a boot, make it a different boot? or amputating a man's leg make him a different man? or changing an averment in a declaration, make it a different declaration? Why then should amending an agreement, make it a different agreement? But if, after its amendment, it still retains its identity, then if it was a written agreement before the amendment, it will be a written agreement afterwards, and that will be a compliance with the first alternative in the statute; namely, that the "agreement" must be in writing.

At least, may we not say, that the incorrect writing will be

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a compliance with the second alternative of the statute? will it not suffice, for a "memorandum or note" of the agreement? There must be a difference between *agreement* and, *memorandum or note of agreement*. And what must that be? I take it, the difference between completeness and incompleteness. *Agreement* is the contract complete; *memorandum or note of agreement* is the contract incomplete, imperfect, even, it may be, somewhat inaccurate, but which may aid us in getting at the complete contract.

[2.] We think, then, upon the whole that a written marriage contract, or any other of the contracts referred to in the fourth section of the statute of frauds, is subject to be corrected by the verbal contract which it undertook to reduce to writing, in every case in which, not to allow the correction, would be, to allow one of the parties to the contract, to perpetrate a fraud on the other. We think, that the statute is to be so construed, as not to prevent the correction in such a case. Consequently, we do not yield to the first branch of the argument of the defendant's counsel.

Secondly, ought the second branch of that argument to prevail? That branch was, that the present is not a case in which, refusing a correction of the written contract by the verbal, would be allowing Duncan, to perpetrate a fraud on Mrs. Bryan.

What then is the present case, according to the pleadings, and to the proof? According to the bill, the case, or, at least so much of it, as is pertinent here, is, substantially, as follows:

A. B. Duncan proposed marriage to Mrs. E. A. Bryan, and, to induce her to accept the proposition, promised her, to convey, to her separate use, the whole of her negroes. He took a list of the negroes, to be used in the drafting of the contract; and, on the next day, he presented, to her, a paper for execution, which, he falsely represented to be, a "consummation of the contract." This paper was read to her, by Harry Herrington, in presence of him, Duncan. Herrington

advised her, that the paper was "in violation" of the contract. Thereupon, Duncan interposed, and said; "that Herrington was mistaken; that said paper was drawn up by a skilful lawyer, and" "was precisely in accordance with the agreement, and did settle the whole of the negroes upon" her, "as her sole separate property, and to no one else; called upon the said Herrington and his wife, to bear witness, that if" Mrs. Bryan "would consent, to sign it, with him, and unite with him, in marriage, he" "would afterwards execute just such a settlement as would suit" her, "whenever she should be satisfied, that the one then presented, did not carry out their agreement." She, relying on the statement, that the paper did settle upon her, the whole of her negroes, to her separate use; and, her fears being appeased by Duncan's promise, that if the paper did not convey the property to her separate use, whenever this should be ascertained, he would execute any other conveyance that would convey it to her separate use, signed the paper, and a few moments afterwards, married him. The paper was, in fact, a violation of the agreement in these particulars, viz: it gave Duncan, a life estate in the negroes; it gave him, "a title in fee," to them, on condition, that he survived her, and she left no children of the marriage; it conveyed "a title in fee," to the children of the marriage, surviving her, reserving an estate for years, to Duncan; it conveyed the property, to the children of the marriage, jointly with her, to vest absolutely at the death of Duncan; that she was to have the property, in fee, only upon condition, that she survived Duncan and no children of the marriage, survived her. The prayer in effect, is, that the written contract may be reformed and changed, so that it shall accord with "the contract or original agreement;" and that the complainants may have the benefit of it as so reformed and changed.

This is the case, according to the bill.

The proof was such, that it would have authorized the jury, to believe the case made by the bill, true.

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This then being the present case, is it true, that it was a case in which, refusing a correction of the writing, would not have been permitting Duncan, to perpetrate a fraud on Mrs. Bryan?

And we think, that it is not true—supposing the facts to be, as stated in the bill. We think, that refusing the correction of the writing, would be to sanction a fraud perpetrated by him, on Mrs. Bryan. We think, that he was guilty of actual fraud, towards her. He not only gave her his own word, that the writing truly expressed the contract, but he made her believe, that he had the word of a skilful lawyer, that it did. Not content with this, he called upon the persons present—persons who were her near relations, and her trusted friends—to bear witness, that, if, after all, the writing did not truly express the contract, and that should afterwards be discovered, he would correct it, and make it truly express the contract. He had her love, and therefore he had her confidence, almost as much, perhaps, quite as much, as, if he was already her husband. Plied in such a way, by such a person, she signed the writing. That did not, by a great deal, truly express the contract. There was nothing in the conduct of Duncan, afterwards, going to show, that he thought the writing expressed that contract. If these things are true, Duncan was, we think, guilty of procuring Mrs. Bryan's signature to the writing, by actual fraud—by wilful and intentional deceit.

At least, he was guilty of constructive fraud. This conduct of his, was conduct which had a strong *tendency*, to deceive, if it was not intended to deceive, and it did deceive. It makes a stronger case of fraud, than were many of those above cited—especially *Pember vs. Matthews*, *Cookes vs. Mascall*, *Montecute vs. Maxwell*.

So much then for the argument of the defendant's counsel in both its branches. We think it not sufficient to show that the case is within the statute of frauds. We think that fraud

takes a case out of that statute, and that there is fraud in this case.

Deeming this argument, invalid, we of course, have to regard it as not sufficient to support the charge of the Court, which, as we have seen, went in effect, this length; that a written marriage contract was not to be corrected by the verbal one, which preceded it, in any case, not, even in the case in which, not to allow the correction to be made, would be, to allow one of the parties to practice a fraud on the other. No other argument occurs to us which, we think, is sufficient to support that charge, therefore, we think it erroneous.

The next ground to be considered, is, the fifth.

This ground consists of a charge of the Court, and that charge, if not the same, in substance, as the charge in the third ground just considered, is, in effect, as follows: That a written marriage contract, if it is "understood" by the parties to it, is not subject to be changed by evidence, that the man, at the time of its execution, verbally promised the woman, that if she would execute it, he would afterwards make it satisfactory to her. Supposing the charge to have been this, was it right?

It was not right, if the decision in *Pember vs. Matthews*, (*supra*,) was right. In that case, Lord Thurlow said—"but where the objection was originally made and promised by the other party to be rectified, it comes amongst the string of cases where it is considered as a fraud." And, in that case, there did not exist, any confidential relation between the parties, like that which exists between two persons who are engaged to be married to each other and whose appointed time of marriage has actually arrived.

The case of *Coldcat vs. Hide*, and that of *Fielder vs. Studley*, (both cited above,) go quite as far as *Pember vs. Matthews*.

So, also, does the whole large class of cases, in which, a verbal promise to execute a defeasance, made on the execution of the absolute deed, has been enforced. So, equally, does

that other class of cases in which, a verbal promise by the devisee to apply the land devised to him, to the trusts contemplated by the testator, has been enforced.

We are not prepared to say, then, that this charge was right; but, even, if it was right, we think, it should have been accompanied with a caution to the jury, that, if they believed, that Duncan assured Mrs. Bryan, that the writing was the same as the contract agreed on, and was the work of a skilful lawyer, and she signed it in reliance on this assurance, they ought not to believe, that she did understand the writing.

This, of course, is said on the assumption, that what the bill says as to what was the contract agreed on, is true.

The next ground to be considered, is the seventh; which consists of a charge of the Court, to this effect, that if, at the time, when the writing was executed, Duncan represented to Mrs. Bryan, that it gave to her, what it distinctly declared, she should not have, the representation is "inadmissible," to "contradict" the writing, unless she was "deceived as to what it contained." Was this charge right?

Even granting, that Mrs. Bryan was not mistaken as to what the writing contained, yet, according to *Pember vs. Matthews*, and the other cases just referred to, she had the right, to rely on the promise of Duncan, (if there was one,) that, if the writing did not contain the contract, he would make it do so.

Besides, if Duncan assured her, that the writing was the same as the contract agreed on, and that it was the work of a skilful lawyer, and if she signed the writing in consequence of this assurance, the jury ought to have concluded, that she was "deceived" as to the contents of the writing. And this, the Court ought to have told the jury, along with the other charge, even if that charge was legal. But we do not say that it was legal.

We, then, think, that this charge was erroneous.

So much for the three charges taken up in succession, the third, the fifth, and the seventh.

I go to the fourth ground, and dispose of it in a word, it is like the first ground, and what was said of that, is said of it.

[3.] The sixth ground was a charge to the jury, that "when the answer of the defendant, is responsive to the allegations in the bill, it is evidence, and must be received, unless it is overcome by the testimony of two witnesses, or, one, and strong corroborating circumstances."

We, think, that the word "strong," ought to have been omitted. We know of no decision, that the corroborating circumstances must be "strong." And the rule as laid down by the best elementary writers, does not include the word, strong. If the circumstances are such as to give a clear preponderance against the answer, that, we think, is enough; the answer is "overcome."

We find nothing in the evidence, to authorize the charge stated in the eighth ground. We find nothing in the evidence, going to show, that Mrs. Duncan bestowed her property on her husband.

In respect to the ninth ground, it is sufficient to refer to what has been said of the third, and fifth, and seventh grounds.

The tenth ground was as follows: "The Court erred in charging the jury, that if the testimony showed, that the provisions of the marriage contract, and the will, were explained to Mrs. Duncan, in the Court of Ordinary; and also, that after the explanation, she expressed to the witness, that she was satisfied with the arrangement of setting aside the contract, and made no complaint about it not being in accordance with the original contract, that constitutes a circumstance, to show it was in accordance with the original contract."

There is nothing in the evidence to show, that the provisions of the marriage contract, and those of the will, were explained to Mrs. Duncan. It is true, that it appears in the

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evidence, that, in the Court of Ordinary, when the will was propounding for probate, Gen'l Morgan, in the presence of Mrs. Duncan, stated; "that the contract and the will gave her about the same things"—but this is no explanation of what the contract gave her, or, of what the will gave her. A part of her case as stated in her bill, is, that Duncan told her that the contract was drawn by a skilful lawyer, and gave her the whole of her negroes to her separate use; and that she relied on this statement. Now, if she understood Gen'l Morgan to mean, that the will too, gave her all of her negroes, her assenting to the abrogation of the contract, was not even a "circumstance," to show, that the contract as written, was "in accordance with the original contract." And for aught that appears, she might have so understood him.

At any rate, the Court ought also to have told the jury, that if Mrs. Duncan's election to take under the will, was a "circumstance" to show, that the written contract was correct, it was a very slight one, as there were so many other, supposable motives for her conduct in making the election.

The eleventh charge was, as follows: "The Court charged the jury, that if the complainant, Mrs. Duncan, consented to the cancellation of the marriage contract, in the Court of Ordinary of Lee county, and, with knowledge of her rights, elected to take under the will of Alexander B. Duncan, and the parties acted under it, she then cannot recover in the suit, or have the contract reformed."

This charge, we think, needed explanation—needed particularizing, as thus; that, if Mrs. Duncan had the right, to repudiate the contract as written, and to insist on what she says was the contract agreed on, and if she knew this, then, if she elected to take under the will, and the executor had acted on that election, in such a way, that he, or the estate, would be injured, unless she were held bound by her election, she was bound by that election; otherwise by it she was not bound.

It was argued, that if she was allowed to claim under the

contract, the effect would be hard upon the two children by Duncan, as in that case, she would, by the contract, get all of her own property, and, by the will, get also, a third of his property. But, we suppose, that if she elects to take under the contract, she will deprive herself of the right to take anything, under the will. This however is a point not strictly in the case, and, therefore, it is not decided.

The twelfth ground was, that the verdict was not authorized by the evidence. We think, it best, not to express an opinion on this ground.

The thirteenth and last ground involves the same point as the twelfth. We dismiss it, therefore, with a single remark, viz: that the charge stated in it, seems not to be consistent with some of the previous charges.

Judgment reversed and new trial granted.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATLANTA,
AUGUST TERM, 1859.

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING,
LINTON STEPHENS, } Judges.

JAMES M. SMITH, and others, plaintiffs in error, vs. THOMAS W. GOODE, defendant in error.

The same vs. WILLIAM G. HORSLEY.

The same vs. THOMAS BEALL.

The same vs. A. H. CHAPPELL.

The same vs. JOHN J. FLOYD.

[1.] If one of the attorneys for the plaintiff in judgment collects the judgment, the others may, by *motion* against him, enforce their liens on the money for their fees.

[2.] One of several of the attorneys for plaintiffs in a judgment, collected money on the judgment, and was ruled by the other attorneys for so much of it as would pay their fees. He was properly served with the rule. Two of the plaintiffs in the judgment came in and defended the rule in his place. They appeared by another attorney, and he urged against the motion, amongst other things, that his clients had not had sufficient notice of the motion. He did not say he was not ready, did not ask for time, or suggest anything to call for delay. The Court overruled the objection.

Held, That the Court did right.

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[2.] He then requested that the case might be tried by a jury.

Held, That this request ought to have been granted.

Rule, in Upson Superior Court. Decision by Judge CARRISS, at May Term, 1859.

The foregoing cases, all depending upon the same or similar facts, and the same decision being made in each, by the Court below, were heard together in the Supreme Court.

The following rule was taken out against James M. Smith, one of the plaintiffs in error, viz.:

“JAMES S. WALKER, NATHANIEL F. WALKER, Jr, and DANIEL GRANT, Trustee for FRANCES C. COLEMAN,
vs.

NATHANIEL F. WALKER, Sen'r, ex'or of ALLEN M. WALKER, dec'd, and NATHANIEL F. WALKER, individually.

} Bill for discovery, account and relief; and submission to arbitrament and award thereon.

“It appearing to the Court that the defendant, Nathaniel F. Walker, executor of Allen M. Walker, deceased, has paid over to James M. Smith, Esquire, one of the complainants' solicitors, a considerable sum of money, in part payment of the award made in the above stated case, and that the same is now in the hands of said Smith, as solicitor aforesaid; and Thomas W. Goode, also one of the solicitors and counsel of complainants, representing to the Court that he has a lien on said sum in said Smith's hands, for counsel and solicitor's fees due to him in said case by said complainants, to wit, the sum of two thousand dollars. Now, therefore, on motion of said Thomas W. Goode, it is ordered that said James M. Smith do pay over to said Goode, out of said fund, the amount of counsel and solicitor's fees to which he is entitled as aforesaid, or show cause to the contrary to-morrow morning, and that said Smith be served with a copy of this rule.”

To this rule Smith, the respondent, answered as follows:

"And now comes the respondent to the within *rule nisi*, and for answer to the same, says, that he now has in his hands, and undisposed of, the sum of \$8,776 46, collected by him from Nathaniel F. Walker, defendant in the case named in the within *rule nisi*, that this respondent claims a lieu on said fund for services rendered as one of the solicitors in said case, for the sum of \$2,500, and prays that the same be allowed and adjudged to him by this honorable Court, and respondent having fully answered, &c.

"J. M. SMITH."

The above rule coming on to be heard, James S. Walker and Nathaniel F. Walker, Jr., by their counsel, objected to, and protested against the hearing and trial thereof, upon the grounds, that the fund, admitted to be in the hands of said respondent, was a joint fund, and belonged to James S. Walker, Nathaniel F. Walker, Jr., and Frances C. Coleman, a *feme covert*, and that the Court has not jurisdiction in this summary manner. And further, that said James S. and Nathaniel F. Walker, Jr., and Daniel Grant, trustee for Mrs. Coleman, had not been served with said rule, or any process by which they were made parties to this proceeding. And further, that said Grant was not present.

It was admitted and stated by respondent, Smith, that sometime before the sitting of this Term of the Court, he notified Grant that said fund was in hand, and that proceedings would be had, to dispose of said fund at this Term of the Court, and that Grant said that he would take some proceeding to have said money disposed of at this Term of the Court. It was further stated, that said Grant was absent from the State on business.

N. M. Harris, Esq., also stated that he was present to represent James S. Walker and Nathaniel F. Walker, Jr., and

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had a power of attorney from J. S. Walker for that purpose, authorizing him to employ counsel.

The Court held and decided that the solicitors of the complainants, in the original suit in equity, had a lien on the fund in Court for their fees, and that the Court had jurisdiction so far as to award them their fees, and direct the same to be paid out of the same; and as the parties in interest all had notice that the fund in Court would be disposed of at this Term of the Court, the Court ordered the cause to proceed.

To which ruling and decision respondent excepted.

James M. Smith, Esq., testified that the fund in his hands was collected by him of Nathaniel F. Walker, Sen., in part of a judgment or decree in Upson Superior Court, wherein James S. Walker, Nathaniel F. Walker, Jr., and Frances C. Coleman, wife of Edmund Coleman, by her trustee, Daniel Grant, were complainants, and Nathaniel F. Walker, Sen., executor of Allen Walker, deceased, was defendant. That the recovery in said case was ninety or one hundred thousand dollars, including the payments made after the suit was commenced, and before the award, and interest thereon to the date of the award. That Thomas W. Goode, Absalom H. Chappell, John J. Floyd, Barnard Hill, James M. Smith, (the witness and respondent,) William G. Horsley, and Thomas Beall, were the solicitors for complainants. That Judge Worrill was also employed and engaged in the case for complainants at the commencement, but went out on being elected Judge. Thomas W. Goode rendered valuable services in the case—he drafted and filed the original bill—was one of the original counsel, and was active and efficient in preparing the case and arguing it before the Court, up to the time of his becoming infirm, which was towards the close of the case. Can't enumerate the services he did render; thinks the fee he charges, \$2,000, is a reasonable one.

Barnard Hill, O. C. Gibson, James W. Greene, John J.

Floyd, and *Absalom H. Chappell, Esquires*, all sworn and testified, in substance, as Smith had testified, except that Hill declined to give an opinion as to the value of the services rendered. They testified further, on the cross-examination, that from ten to fifteen per cent. on the amount recovered was a fair allowance or charge for counsel fees in a case of this kind.

Here movant closed, and counsel for the Walkers moved to be allowed to tender an issue as to the value of services rendered, and that the case be submitted to a jury. The Court held and decided that if he had any issue of fact to make, he might go to a jury if he would tender an issue; as to the rendition of the services, the Court would direct it to be tried by a jury. Counsel replied that he had no such issue to make; he could not deny that movant had rendered services.

The Court held that the question as to the lien of counsel for fees upon the fund in Court, and the amount of fees to be allowed, was for the Court, and the intervention of a jury was not necessary to enable the Court to decide it.

To which ruling and decision counsel for respondent excepted.

Respondents then swore *Amos W. Hammond, Esquire* who testified that he knew nothing about the case; but after being informed by counsel of the amount involved, number of counsel, and the time the case was pending, he thought that twelve and a half, or fifteen per cent. on the recovery was a reasonable charge for counsel fees; thought that counsel who prepared a case was entitled to as large a fee as those who conducted the case in Court.

The testimony being closed, the Court made the *rule absolute*, and passed the following order. (After reciting the case, the issuing of the rule, the answer, &c.) "It having been

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made to appear to the Court that the said Thomas W. Goode was one of the complainants' counsel and solicitors in said case, and rendered professional services as such therein, and and that said services were of the value of two thousand dollars, the amount claimed by him for his services heretofore and hereafter to be rendered by him to the close of the case: And no cause having been shown to the contrary, either by the said James M. Smith, or by the complainants, who had, as it appeared to the Court, notice of the purpose of the said Thomas W. Goode, and other solicitors of the complainants, to enforce their lien on said fund, as counsel and solicitor's fees, by rule, at this Term of the Court. It is, therefore, ordered by the Court, that the said *rule nisi* be and the same is hereby made *absolute*, and that the said James M. Smith pay over to the said Thomas W. Goode the sum of two thousand dollars, out of the money now in his hands, received by him as aforesaid, if the fund in his hands be sufficient; if not, then ratably with the fees of other counsel and solicitors adjudged them at this Term of the Court. And that the said Thomas W. Goode execute and deliver to him a receipt for the same, and that this be a discharge to him of liability to that extent to said complainants."

To which order and decision counsel for respondents (for the Walkers) excepted.

Similar rules were taken out by Thomas Beall, William G. Horsley, John J. Floyd, and Absalom H. Chappell, Esquires, respectively. To which the respondents answered, and testimony submitted in support of the respective claims.

The amount claimed by, and ordered and adjudged to be paid to Thomas Beall, Esquire, out of the fund in the hands of James M. Smith, Esquire, was \$1,200. To John J. Floyd, Esquire, \$2,000. To Absalom H. Chappell, Esquire, \$1,500. To William G. Horseley, \$1,200.

To all which counsel for the Walkers excepted.

N. M. HARRIS; and SIMMS, for plaintiffs in error.

GIBSON; and J. J. FLOYD, *contra*.

By the Court.—BENNING J. delivering the opinion.

Motion was the form of procedure in this case, and the first question is, was that an allowable form of procedure?

[1.] Motion is an ordinary form of procedure against attorneys at law, sheriffs, clerks, and other officers of Court, to enforce rights existing against them, in their official character, such as the right to money collected by them for suitors. That the plaintiff may rule his attorney for money of his, collected by the attorney, there can be no doubt. And if the plaintiff may rule him in that case, why may not an associate attorney rule him in the case in which it happens that he has collected the money of their common client—money, therefore, upon which they have each a lien for their fees. The lien gives the associate attorney a perfect right to have so much of the money as will pay his fees. Why, then, may not he, too, rule for his money? We see no reason why he may not. We, therefore, agree with the Court below, that motion was a proper form of remedy in this case.

The next question is, was the notice given of the motion, to James S. Walker and Nathaniel F. Walker, Jr., sufficient?

The motion was not against them, but against their attorney at law, James M. Smith, who was the one of their attorneys that had collected a portion of their judgment, and had the money in his hands. And there is no question but that the notice to him was sufficient, so far as he was concerned. Was it necessary that there should be notice to anybody but him? He alone had the money; he alone, perhaps, was subject to a rule; and he was bound to make all due resistance to the motion; for if the motion went against him, improperly, the judgment would be no protection to him

against his clients, the plaintiffs in the judgment, they being no parties to the motion, and they, consequently, would be able to collect the amount of the judgment out of him, and thus they could make him pay the money twice. When the Sheriff is ruled, he alone is served with the rule; and this is so, even in the case in which there are several claimants of the fund. We, therefore, are not prepared to say that, there was a necessity for notice at all to the plaintiffs in the judgment—a necessity for notice to any but Smith.

Concede, however, that a notice to the plaintiffs in the judgment was necessary, did they not have it? Grant, one of them, is not complaining; so we may dismiss the question as to him. The other two, James S. and Nathaniel F. Walker, Jr., were represented by their attorney at law, Mr. Harris. They appeared by him, and defended the case, in Smith's place. The Court, it seems, allowed them to do so, as a matter of course. Very well. If they took Smith's place, they had to take it as Smith held it, and he held it under sufficient notice. In this view, then, they had sufficient notice.

But even if this view is wrong, there is another, a third view, that will show, we think, beyond question, that there is nothing in this ground of a want of notice.

Conceding that they were entitled to notice, what was the kind of notice to which they were entitled? Reasonable notice; no other. For aught that appears, they had reasonable notice by their attorney, Mr. Harris. When the motion was called, he appeared for them, and objected to the motion, amongst other things, that there was no notice of it to his clients. He, at that time, at least, if not before, had notice of the motion. Did he need any earlier or other notice than that? It does not appear that he did. It is to be presumed that he did not, because he did not suggest that he was not ready for the motion; as ready as he would have been if he had had a month's notice of it. He did not move for a continuance of the case, or even ask for its temporary postponement. We are bound to presume, therefore, that he was

ready for the case; if so, the notice, however short, was reasonable notice, for what is the reason for notice in any case? It is only to enable the party to get ready for his defence.

[2] We think, then, that for this, if not for the other two reasons, there was a sufficient notice to the two Walkers, plaintiffs in error.

The next and last question is, whether the case should have been tried by a jury, as the plaintiffs in error requested that it should?

This is a question not free from difficulty. We think that the case ought to have been tried by a jury. It was a case in which there was, in substance, a suit for unliquidated damages; a case in which the suit had ceased to be a suit, except in form, against the attorney, the party subject to the rule, and had become a suit, in substance, against his clients, parties not subject to the rule. And the questions, so far as they were concerned, were precisely the questions that would have existed, had they been sued by regular action for the fees. And if the suit had been in that form, they would have been entitled, beyond question, to a jury trial. They requested a jury trial. We think that in every such a case there ought to be a jury trial.

[3.] We think, therefore, that the Court, in refusing a jury trial, erred, and, consequently, that there ought to be a new trial.

On the other questions, the conclusions to which we have come are the same to which the Court below came.

What has thus been said, is applicable to each of the five cases.

Judgment reversed and new trial granted.

Brown et ux. et al. vs. McWilliams et al.

**JACKSON G. BROWN and WIFE, and others, plaintiffs in error,
vs. JOHN MCWILLIAMS, Sen'r, et al., defendants in error.**

Where a father, in limited circumstances, receives a fund, as guardian for his minor children, and by order of the Court of Ordinary, is allowed to retain the same without interest, the sum being small, as compensation for his trouble and expense in collecting the money, in managing it, and to aid him in the support and maintenance of his wards, and upon the intermarriage of two of them, settles with their husbands, paying them over the original amount, one of them, if not both, having full knowledge of all the facts, and upon a bill filed after the lapse of seventeen years from the settlement with the first, and seven or eight years since the settlement with the last, and the jury find for the defendant, a Court of Equity, under all the facts of the case, will not disturb the verdict.

**In Equity, in DeKalb Superior Court. Tried before Judge
BULL, April Term, 1859.**

This was a bill in equity, filed by Jackson G. Brown, and Susan, his wife, and James W. Brown, and Martha, his wife, against John McWilliams, Senior, the father and former guardian of said Susan and Martha, his daughters, for an account and payment of a legacy bequeathed to them by the will of their grand-father, John McGowan, deceased, of Laurens district, South-Carolina.

It appeared from the bill and answers, that a legacy being left to defendant's children, as aforesaid, he, as their father and guardian, received the same about the 26th January, 1835. That afterwards, an order was passed by the Court of Ordinary of DeKalb county, exempting and discharging defendant from all liability for interest on said legacy, in consideration of the trouble and expense which he had been put to, in going to South-Carolina and obtaining said legacy, and in further consideration of his maintaining and supporting his children, free of charge, until they attained the age of twenty-one years.

It further appeared, that after the marriage of Jackson G. Brown and James W. Brown, the complainants, with defendant's daughters, he paid to them respectively, the sum of

\$404 90, as the share due to them in right of their wives and that they, with their wives, executed receipts to him in full, for their said legacies in his hands as guardian.

This bill was filed to open said settlements, and for an account of the legacies received by defendant, irrespective of said receipts, which the bill alleges were given by complainants upon the representations of defendant that they contained the full and true amounts due to them, and without a knowledge on their part of the real and correct sums or amounts coming to them.

Upon the trial, complainants proved that John McWilliams, Sen'r, owned, in 1835, four or five hundred acres of land, worth \$2,500 00; three negroes, worth \$1,500, stock, cattle, &c.

At the conclusion of the testimony, and after argument, the Court charged the jury:

1st. That when a father is guardian of his infant children who have a separate estate or property, the law will allow him to appropriate the income of such estate, or so much as may be necessary, to the support and education of the children, notwithstanding he may be able to support and educate them out of his own property.

2d. That the statute of limitations begins to run in favor of the defendant from the date of the settlement, unless it be proven that there was fraud in the settlement; in which event, the statute did not begin to run until the fraud was discovered.

3d. That if the receipts were given by the complainants, with a full knowledge of the circumstances, they were concluded and bound by them, though receipts were ordinarily *prima facie* and not conclusive evidence of a settlement in full, which may be reopened upon proof of mistake, ignorance, &c.

Counsel for complainants requested the Court to charge the jury, "that the fact that the guardian did not make annual returns, was sufficient to cast suspicion upon the settle-

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ment, and to avoid the receipts, under all the circumstances of this case;" which charge the Court refused to give.

And further, "that the fact that the guardian did not make his annual returns, as required by law, was enough to throw upon him the *onus* of showing that the amounts specified in the receipts were the true and correct sums due to complainants;" which charge the Court also refused to give, but charged, that the fact that the guardian did not continue to make his annual returns made no difference, if complainants knew the amount in his hands, and consented to his retaining the interest for expenses, commissions, support, &c.

To which charges and refusals to charge complainants excepted.

The decree was for the defendant. Whereupon, complainants tender their bill of exceptions, and assign as error the charges and refusals to charge as above stated.

J. M. & W. L. CALHOUN; and GLENN & COOPER, for plaintiffs in error.

MURPHY & CANDLER, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

We do not think the verdict in this case should be disturbed.

The Court of Ordinary, having jurisdiction over the subject, and acting, as we are bound to presume, with a full knowledge of Mr. McWilliams's circumstances, passed an order authorizing him to retain the interest on the money received by him in South-Carolina, for his minor children, for his trouble and expense in collecting the fund, his commissions, and to aid him in the support and maintenance of his wards. That order stands unreversed. One of the complainants, certainly, if not both, with a full knowledge of the facts, settled with their father seventeen years, and the other seven or eight years, before this bill was filed. Being satisfied that the arrangement made between the Court ofordi-

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nary and the guardian was a reasonable one, we are unwilling to interfere with it, especially after such a lapse of time. It was bad enough for these sons-in-law to rob the father of his daughters against his consent. It would be still worse to allow them to harass his old age, under the circumstances of this case, at this distant day.

Judgment affirmed.

JOHN C. AYCOCK, plaintiff in error, vs. HENRY D. LEITNER,
defendant in error.

[1.] That a *fi. fa.* is the first execution issued in a bail case, does not discharge the bail

[2.] When the Term to which a *ca. sa.* is returnable, is adjourned to another day, a return of the *ca. sa.* to the adjourned Term, will be regular, and will serve as the return required, before a *sci. fa.* against bail, can be issued.

[3.] In a bail case, the Sheriff was the bail and the *sci. fa.* was directed to the Coroner, and the Sheriff acknowledged service of the *sci. fa.*, and waived service of it by the Coroner, or any other officer.

Held, That even if the direction was wrong, this acknowledgment and waiver, cured the error.

Certiorari, from Cass county. Decision by Judge Crook,
March Term, 1859.

The following are the facts of this case:

Henry D. Leitner brought suit against Charles A. Hamilton, and held him to bail, in the Inferior Court of Cass county. John C. Aycock became his surety in the bail bond. Judgment was obtained against Hamilton, November 24th, 1856, and a *fi. fa.* issued December 10th, 1856, which was returned by the Sheriff "no property" 23d May, 1857. On

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the 25th August, 1857, a *cupias ad satisfaciendum* issued, and was returned *non est inventus*—return dated 11th January, 1858, but the return purported to be made to November Term, 1857, which was the regular Term of said Court, but there was in fact no Court held in November, but an adjourned Term held in January, 1858, at the time the Sheriff's return bears date.

Plaintiff sued out *scire facias* 24th March, 1858, directed to the Coroner of Cass county, against Hamilton, principal, and Aycock security on the bail bond, to show cause why judgment should not be entered against them, &c. Aycock was Sheriff of the county at the time the *scire facias* issued, and acknowledged due and legal service 30th March, 1858.

At the trial in the Inferior Court, upon plaintiff's motion to take judgment against the bail, Aycock, for the amount of his recovery against the principal, counsel for Aycock objected on the grounds:

1st. That a *fi. fa.* had been first issued upon the judgment against the principal debtor.

2d. Because the *ca. sa.* being returnable to November Term, 1857, the return of *non est inventus* thereon was entered thereon 11th January, 1858.

3d. Because the *scire facias* was directed to the Coroner of Cass county.

The plaintiff moved to amend the *scire facias*, by addressing it to all and singular the Sheriffs of this State, and the deputy Sheriffs of the high Sheriffs.

And the deputy Sheriff proposed to amend the return of *non est*, so as to make the entry thereof bear date on the first day of the November Term, 1857, of said Inferior Court.

The Court refused the amendments, and discharged the bail, and dismissed the *scire facias*, and plaintiff, upon exceptions to said rulings and judgment, sued out a *certiorari*, and the case thereupon coming on in the Superior Court, that Court, after argument, sustained the *certiorari* and re-

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versed the judgment of the Inferior Court, and counsel for Aycock excepted.

MILNER & PARROTT, for plaintiff in error.

PRINTUP; and McCONNELL, *contra*.

By the Court.—BENNING J. delivering the opinion.

Were the objections to the motion to enter up judgment against the bail, good? The Court below thought they were not, and we think so too.

[1.] The first of them, was, that a *fi. fa.* was issued before the issuing of the *ca. sa.* Is there any law that discharges the bail, if a *fi. fa.*, and not a *ca. sa.*, is the first execution issued? We know of none; we were cited to none. Certainly, so far as the principal is concerned, the plaintiff may have first, a *fi. fa.*, and then, a *ca. sa.* (*Tidd Pr.* 1005, 985.) Indeed, there is authority, that he may have both at the same time. (*2 Mod. Ca.* 302; *Com. Dig.* "Execution H.") And if it be true, that the plaintiff has the right, so far as the principal is concerned, why is it not true, that he has it also, so far as the bail are concerned? The exercise of the right, deprives them of nothing. Whether it be a *fi. fa.*, or a *ca. sa.*, that is the execution first issued, is not material to the bail. Whichever it be, they can equally discharge themselves, at their pleasure, by a surrender of their principal; for which ever it be, he still remains equally, in their custody, or in their power.

Therefore, we can see nothing in the objection.

The second objection was thus stated: "Because, the *ca. sa.* being returnable to the November Term of 1857, had an entry of *non est inventus*, dated January 11, 1858."

But the November Term was adjourned until a day in January, and the day on which the entry was dated, was a day in that adjourned Term. The adjournment of the Court

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in this way, merely enlarged the November Term, and made it include the days in January, during which the Court sat. This return, therefore, was perfectly regular. Besides, the fact, that the Sheriff kept the writ in his hands, till January, when he might have returned it in November, was to the benefit of the bail.

[2.] We can see nothing valid, then, in the second objection.

The third objection was, "that the *sci. fa.* was directed to the Coroner."

Aycock, the bail, was the Sheriff. Therefore, it would not have been proper to direct the *sci. fa.* to him. He acknowledged service of it, in the following words: "I acknowledge due and legal service of this writ of *scire facias*, and waive service, and all service of Coroner, or any other officer."

This waiver was, we think, sufficient to cure any defect in the direction of the *sci. fa.*, if there was any defect in it; and we do not say that there was.

[3.] We think, then, that this objection also was invalid; consequently, we must affirm the judgment of the Superior Court.

Judgment affirmed.



NATHAN RENWICK, plaintiff in error, vs. THE LA GRANGE BANK, defendant in error.

[1.] It is error in the Court to submit to the jury an issue of fact, upon the assumption that there is evidence to authorize a finding, when there is proof to warrant the assumption.

[2.] The verdict of a jury will be set aside and a new trial granted, when there is no evidence to warrant the finding.

Assumpsit, in Troup Superior Court. Tried before Judge CABANISS, May Term, 1859.

This was an action of assumpsit, brought by Nathan Renwick against the LaGrange Bank, to recover for services rendered by plaintiff, as President *pro tem.* of said bank; and also one hundred and sixty dollars, the amount claimed to be due from dividends declared on the capital stock of said bank, he being the owner of ten shares thereof. Plaintiff claimed for his service rendered, as *President pro tem.*, from 14th February, 1856, until the 25th day of March, 1858, the sum of six thousand dollars.

After the testimony closed, the Court charged the jury, that the plaintiff must recover according to his allegations and proof. He had sued the bank for services rendered as President *pro tem.*; the action is brought to recover the value of the services rendered, and not for a salary. It was therefore incumbent on him to prove that the services were rendered, and the value of those services, and he must recover accordingly, if he recovered at all. The jury must determine, from the evidence, what services had been proven, and their value, and find whatever amount was shown to be due. But if, at the time he entered upon the duties of President *pro tem.*, and while acting as such, he did not intend to charge the bank for his services, but intended to render them gratuitously, he could not afterwards convert a gratuity into a demand, unless he had given notice of this change of intention, and the bank assented to it.

The Court further charged the jury, that if the plaintiff was the owner of ten shares of the capital stock of said bank, he was entitled to whatever dividends had been declared on said stock while he owned it; but if he had already been paid said dividends, he was not entitled to recover them again.

To all of which charge plaintiff excepted.

The jury found for the plaintiff the sum of fifty dollars.

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Whereupon, counsel for plaintiff tendered his bill of exceptions, assigning as error the charge aforesaid.

G. A. BULL, for plaintiff in error.

B. H. HILL, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

We see nothing in the record in this case, which would authorize the inference, that the services rendered by the plaintiff to the defendant, were a gratuity; and to make this assumption the ground of a charge to the jury. Nor is it true, that the right of the plaintiff to compensation is to be tested by his intention. He may not have intended charging for his services. Still, if he did not communicate that intention, but kept it to himself, it will constitute no bar to this suit. He might contract to serve for a salary, and yet secretly intend not to claim it. Surely, this private purpose, shut up in his own bosom, and undeveloped by words or acts, will not be in his way. We repeat, we see not a particle of proof in the record to authorize the charge upon this point to the jury. And while it is quite likely that the effect of this charge was to incline the jury to undervalue the services of the plaintiff, still, as they found something, we are bound legally to say, that they did not take this view of the case, and that consequently a new trial could not be granted on that account, notwithstanding the error of the Court.

It is rather questionable whether the depositions of Holland and Austell were not admissible. Perhaps their testimony could be presented in a less objectionable shape, by asking those witnesses what the services of a bank President were worth, who rendered such services as were shown to have been performed by the plaintiff, besides giving the institution the credit of his name, which was worth more perhaps to this bank than any thing else. Besides, the

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amount of business transacted by this bank, is an element to be taken into the computation, when fixing the pay to which the President is entitled.

And although this suit is not for a specific sum—as a salary—why may not the salary of Burch, the President of this bank, as well as the salaries of Presidents of other banks of like character and business, be given in evidence to show, even under a *quantum meruit*, what the bank itself thought such services worth?

[1.] As to the finding of the jury, that the bank dividends were paid, it is unsupported by a scintilla of proof. And it was error in the Court to refer this, as an open issue, for the jury to try.

The idea, we suppose, upon which the charge was given, and the jury acted, upon this branch of the case, was: That Dr. Renwick, being an officer of the bank, could so conveniently have drawn his dividends, he must have received them. But because he was an officer of the bank, that gave him no more right to thrust his hands into the vaults of the bank, and draw out the money, than if he had been an entire stranger. Many stockholders suffer their dividends to accumulate, especially if the amount is small, and they are not needing funds. Where are the vouchers for the payment of these dividends? Does any bank pay dividends without taking the necessary acquittances? Such is not my experience, nor the experience, we apprehend, of any stockholder. Surely, evidence that the dividends were declared, and that is all we have upon the subject, is no proof of their payment.

It is suggested by counsel for the defendant in error, that rather than send the case back, if we think the testimony insufficient to support the verdict as to the dividends, that they will pay the sixty dollars rather than be troubled with another trial.

[2.] The Court has the power, and has used it, to grant new trials upon terms; that is, unless the successful party will write off the excess above what is right. But we have

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no power too add to a verdict. It would not be operative. This appeal had best be addressed to the plaintiff, by way of tender or otherwise.

Judgment reversed.

ABRAHAM MARTIN, administrator, claimant, plaintiff in error,
vs. JAMES MCCONNELL, administrator, *de bonis non, cum*
testamento annexo, defendant in error.

Joseph McConnell died in 1840. By his will, he gave a life estate in his negroes to his widow. He directed that all of his children should have an equal share of his property. And at the division, which was to take place at the death of his wife, he gave Esther, a woman, to Sarah Wardlaw, his widowed daughter. Sarah afterwards, and since the death of the testator, intermarried with James Martin.

Held, That Sarah took an equal share only of her father's estate, to be ascertained and determined at the death of her mother; and that it vested in her husband, James Martin. That the provision in the statute requiring claims, at administrator's sale, to be made previous to sale day, is directory only; and that failure to do so, does not invalidate the claim.

Claim, in Clayton Superior Court. Tried before Judge BULL, May Term, 1859.

This was a claim, interposed by Abraham Martin, administrator of his deceased wife, Sarah Martin, formerly Wardlaw, to certain negroes advertised to be sold by James McConnell, administrator *de bonis non, cum testamento annexo*, of Joseph McConnell, deceased.

The facts of the case, as agreed by the counsel of the respective parties, are as follows:

Joseph McConnell died about 1840, leaving his last will and testament, whereby he bequeathed his estate as follows:

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"To my wife, Mary McConnell, during her life, the control of the houses, lands and all the black people, while she enjoys senses to command them justly." Also, certain notes, which "when collected to be managed as to be on interest till a final settlement, as I wish all my children to have an equal part of my substance," &c. "At the division, I give Nancy Barnhill, Adeline; Sarah Wardlaw, Esther; and all the blacks to have liberty to choose their homes among my children," &c. Testator left William and Joshua McConnell his executors, who qualified, and the property mentioned in said will, went into and remained in the possession of the said Mary McConnell, the widow, until her death in the year 1858. Sarah Wardlaw died in 1853. William McConnell one of the executors, died in 1854, and Joshua, the other and surviving executor, died in 1858, shortly after the death of Mary McConnell, the said widow and tenant for life.

Afterwards, James McConnell took out letters of administration *de bonis non, cum testamento annexo*, on the estate of Joseph McConnell, the testator, and took possession of the negro woman Esther, and her children, bequeathed to said Sarah Wardlaw, who afterwards became the wife of claimant, and said James McConnell has advertised said negroes for sale, as administrator aforesaid; and that Abraham Martin, the husband, and administrator of said Sarah, has interposed his claim to the same. It was further agreed and admitted that said Sarah Wardlaw, at the death of her father, Joseph McConnell, the testator, was a widow; that by her first husband, she had five children, who are living, and all of age; that she had no children by her last husband, Martin. That the negro woman Ester and her children, are more than an equal share of testator's estate, and that the plaintiff, James McConnell, as administrator *de bonis non, &c.* aforesaid, obtained, upon due and legal notice and application from the Court of Ordinary of Walker county, an order to sell said negroes.

Upon this agreed statement of facts, and after argument,

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the Court held and decided that Mrs. Martin, formerly Wardlaw, claimant's intestate, took a vested remainder in the property bequeathed to her by the will of her father, to be divided at the death of Mary McConnell the tenant for life; that the shares of all the testator's children should be made equal on said final division, and if the negro woman Esther and her increase exceeded in value the share of claimant's wife, then she must account to the other legatees for said excess, and thereupon dismissed the claim.

To which decision counsel for claimant excepted.

DOYAL, McCONNELL & TRAMMELL; and JOHNSON & ARNOLD, for plaintiff in error.

TIDWELL & WOOTEN, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

We concur with the Court below in the construction put upon the will of Joseph McConnell, deceased, namely: that Sarah Wardlaw, the widowed daughter of the testator, took an equal share only of her father's estate, to be determined at the division, (the death of Mary McConnell his wife.) That this was a vested remainder; and consequently goes to her husband, James Martin, with whom she intermarried after the death of her father.

The testator desired an equal division of his negroes amongst his children; and expresses the wish, that in making the division, the preference of the slaves themselves may be consulted, at the same time mentioning a girl by name, to be appropriated to each of his daughters. And in this sense, and in this only, he may be said to have given Esther to his daughter, Sarah Wardlaw.

As the rest of the negroes have all been sold for the purposes of division, and Mrs. Wardlaw is dead, on whose account alone, this woman was set apart in the division; it is

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as well, perhaps if not better, that she and her children be sold also, and the proceeds distributed. There is no more reason, for withholding her from sale, than any of the others, especially if it would involve necessarily the separation of the mother from her children.

The provision in the statute, that notice must be given of the intention to claim, at an administrator's sale, before sale day, is directory only. It is well enough to follow the direction of the statute in this respect, as it may save the trouble of bringing the property to the Court House, still the failure to do so, does not invalidate the claim.

Judgment affirmed.

EGBERT P. DANIEL, plaintiff in error, vs. **JAMES L. JOHNSON**, defendant in error.

- [1.] When a party proposes to prove that a certain amount of notes was turned over to another, in part payment of a demand, it is not necessary to produce the notes so turned over, the rule concerning the degrees of evidence not applying to such a case.
- [2.] It is legal to prove that notes so turned over, were to be applied, not to the demand sued on, but to what the defendant owed the plaintiff, on account of their partnership debts paid off by the plaintiff, and such notes so paid off are admissible as corroboration of the other proof.
- [3.] A defendant in chancery can not use his answer as evidence for himself in another case, further than he could in the original case, and not in either, unless it appears to be responsive to the bill.
- [4.] It is error to give charges on a state of facts not shown by the evidence.

Assumpsit, in Spalding Superior Court. Tried before Judge CABANISS, at May Term, 1859.

This was an action of assumpsit by Egbert P. Daniel,

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against James L. Johnson, on three promissory notes; one for \$1,150, payable 25th December, 1851; one for \$200, payable 25th December, 1854, and one for \$140, dated 8th January, 1852, and payable one day after date.

The following credits were endorsed on the eleven hundred and fifty dollar note, viz:

"One half of James L. Johnson's stock, when ascertained, at wholesale prices, is to be placed to his credit on this note. 1st June, 1852, which is \$556 28."

"Received on the within note an account on James Daniel for \$28. 25th December, 1855."

"Received on the within note \$35 25, from McCune's note. 22d February, 1854."

On the \$140 note was the following credit:

"Received on the within note \$28 00, October 1st, 1853, from Harleston's note."

"Received on the within note \$5 00, from Bozwell's note. 1st August, 1855."

The defendant pleaded payment and set-off.

At the trial plaintiff offered in evidence the note sued on and rested.

Defendant, amongst other things, offered to prove that plaintiff had admitted some two or three years before, that defendant had turned over to him notes amounting to about \$550, amongst which was a note on Burrell Orr for \$150, to go in payment of defendant's indebtedness to him. Plaintiff objected to this testimony; the Court overruled the objection and plaintiff excepted.

Defendant having closed, plaintiff in reply offered in evidence, a note made by Daniel and Johnson (plaintiff and defendant, who had been partners in a tanning business) dated 3d November, 1851, payable to Thomas C. Trice, or bearer, for \$445, with the credits thereon, and which plaintiff claimed he had paid off. Defendant objected to this evidence, on the ground that said note was against the partner-

ship of Daniel & Johnson, and the payment or possession thereof by plaintiff, was not an individual demand against defendant. The Court sustained the objection and plaintiff excepted.

The plaintiff then offered in evidence the records of the proceedings of a chancery cause then pending, in which defendant was complainant, and plaintiff was defendant, the answer of defendant to said bill, being a part of said record, and in which answer it was alleged that the notes now plead as payment or set-off, was pleaded as payment to Daniel, as agent for Martha C. Martin. Defendant objected to the admission of this record, on the ground that the answer was not competent evidence for plaintiff.

The Court sustained the objection as to the answer, but holds that plaintiff might introduce the bill. To which ruling plaintiff excepted.

The Court charged the jury as follows:

“ That when a debtor makes a payment to a creditor, who has several demands against him, the debtor has the right to apply it to any demand he pleases, and may specify; and if he makes no application, the creditor has the right to apply it to any of his demands he may see proper; if no application is made at the time of payment by either party, the law will then apply it to the debt of the lowest grade. In the case before you, if the payment made by the defendant and which he has pleaded, was by agreement of the parties to be applied to an indebtedness of defendant other than the notes sued on, it must be so applied. If the defendant intended, and directed the payment to be applied to the notes sued on, he was then entitled to a credit to that amount; but if no application was made by either at the time of payment, then it was for them, under the direction of the Court, to make the application, and they had no right to apply the individual funds of defendant, to the payment of his share or proportion of partnership debts, which had been paid off, or taken up by the plaintiff; but his individual assets must be

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first applied to the individual debts of defendant, before any could be applied to the payment of partnership demands or liabilities. His individual funds could not be legally applied to advances made by one partner for the partnership, until an account had been taken between the partners and a balance found against him.

The jury found for the plaintiff two hundred and forty, two dollars and six cents; whereupon, plaintiff moved for a new trial upon the following grounds:

1st. Because the verdict is contrary to the evidence.

2d. Because the verdict is decidedly and strongly against the weight of evidence, and without evidence to support it.

3d. Because the Court erred in the rulings and decisions on the evidence as above stated, and excepted to at the time.

4th. Because the Court erred in its charge to the jury.

5th. Because the verdict is contrary to the charge of the Court and the law.

The Court refused the motion for a new trial, and plaintiff excepted.

PEEPLES & CABANISS, for plaintiff in error.

DANIEL & DISMUKES; and ALFORD, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

This was a case where Johnson, the defendant, was seeking to diminish the demand of the plaintiff, Daniel, by showing that he had turned over notes to the plaintiff, with an understanding that they were to be applied as a credit on the notes sued on.

[1.] The plaintiff objected to the proof on that point. We can see no valid objection to its admission. It was rather vague to be sure, being an admission of plaintiff, that he had received notes to a certain amount to be applied to the defendant's indebtedment, without stating what indebt-

ment; but such as it was, it ought to have gone to the jury for what it was worth. It was said in the argument, that the notes turned over, were the best evidence of their amount, &c. It might as well be said that the bank-bills in which a payment happened to be made, were the best evidence of their amount. There was no attempt here to prove the contents, or any part of the contents of the notes turned over, and hence the rule, as to the best evidence, does not apply. It was a simple question of how much the plaintiff had agreed to credit on his demand.

[2.] The plaintiff offered in evidence, by way of rebuttal, certain copartnership notes of himself and defendant, in connection with evidence that the notes turned over were, by agreement between the parties, to be applied to defendant's part of such copartnership debts as had been paid off by plaintiff. This evidence was rejected, upon the ground that the notes appeared on their face to be firm notes, and therefore had nothing to do with individual transactions between the parties. This ground of objection loses sight of the issue. The question was, whether or not the notes turned over, were to be applied to the notes sued on. If they were by express agreement to be applied to *other* demands (without regard to what those others might be) it was evidence that they were *not* to be applied to the demand in suit. To show that the plaintiff *had* such other demands by producing them, was corroboration of his proof touching the agreement; and the evidence ought to have been admitted.

[3.] The plaintiff offered to read in evidence his own answer, as part of the entire record in a chancery suit, wherein Johnson was complainant, and Daniel was defendant; and upon objection made, the Court ruled it out. We think it was rightly excluded, for it did not appear, so far as we are informed by the record in this case, that the answer was responsive to the bill; if not, it could not be evidence for Daniel, even in the chancery suit, and it will hardly be sug-

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gested that he could use his own answer further in another case, than in the case of which the answer forms a part.

[4.] We think the Court erred in giving the jury any charge as to how payments were to be applied in the absence of an agreement about it between the parties, for that was not this case. Here both sides contended there was an agreement, and all the evidence tended to show there was one. They differed as to what the agreement was.

[5.] The Court erred also in charging the jury on the subject of the proper application of individual funds, when turned over to one partner by another without directions how to apply them. The error here, as in the other instance, was in a mistake of the issue. There was not an absence of directions, but a dispute about what the directions were.

Judgment reversed.

SILAS BELL, plaintiff in error, vs. JOHN F. BROWN, Sheriff,
defendant in error.

The jurisdiction of a rule against a Sheriff, to account for *tax fi. fas.* placed in his hands, lies in the Inferior Court, and not in the Superior.

Rule against Sheriff, in Cass Superior Court. Decision by Judge CROOK, at March Term, 1859.

This was a rule taken out by Silas Bell, tax collector, against John F. Brown, former Sheriff of Cass county, to show cause why he had not, or should not pay to movant, the amount due on certain tax executions, placed in his hands for collection. The receipts of the Sheriff were attached, showing that tax *fi. fas.* from Bell, amounting to

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\$365 65½ principal; \$107 66 interest and cost. Receipts dated 8th January, 1853.

In answer to the rule, the respondent, Brown, stated that while Sheriff of said county, he received from Bell the tax *fi. fas.* mentioned, not for the purpose of collection, but under an express agreement that he should hand them over to the different constables throughout the county, to be by them collected; and further, that most of the defendants in said *fi. fas.* were either insolvent, or had run away or died, leaving no property upon which to levy; that he had complied with the agreement between himself and Bell, and had never received any thing on said *fi. fas.* except a few dollars paid to him since he was served with the rule.

At the hearing, the Court dismissed the rule, and counsel for movant excepted.

GLENN & COOPER, for plaintiff in error.

RICE, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

Without considering at all whether the movant's case was well answered by the defendant, it is sufficient to say that we are not aware of any law which gives the Superior Court jurisdiction in such a case. None was even suggested in the argument, and from the hasty review which our limited time allowed us to make of the statutes relating to this subject, we find this jurisdiction vested in the *Inferior Court*, (*Cobb's Digest*, page 1053) and do *not* find it vested in the Superior Court. We think, therefore, the Judge did right in discharging the rule.

Judgment affirmed.

Bailey vs. New, adm'r.

EDMUND J. BAILEY, plaintiff in error, vs. WILLIAM NEW, administrator, defendant in error.

[1.] A surety being sued, pleaded, that he had required the creditor, to sue the principal, and that the creditor had failed to do so, for three months.

Held, That evidence, that the surety was indemnified by the principal, was admissible on this plea, as, such indemnity would be a circumstance tending to show, either, that the surety had never made such a requisition, or, that if he ever had, he had waived it.

[2.] If the surety give notice to the creditor to sue the principal, and then ask the creditor for indulgence, he waives the notice, provided, his request was made before the expiration of three months after the notice, and provided it was a request for indulgence to his principal, not to himself.

Debt, in DeKalb Superior Court. Tried before Judge BULL, April Term, 1859.

This was an action by William New, administrator of Samuel H. Pruitt, deceased, against Luke J. Robinson, principal, and John M. Robinson and Edmund J. Bailey, securities. Bailey only was served with process, and appeared and pleaded that he was discharged, by reason of the failure of the holder of the note to sue the principal within three months after he was notified to do so.

The testimony being closed, the Court, amongst other things, charged the jury:

"That if the defendant, after he had required the plaintiff to sue, asked indulgence upon the note from the plaintiff, it was a revocation of the notice; and a waiver of his rights under the notice; that if there existed any legal impossibility for the plaintiff to sue, that is, if the principal was beyond the jurisdiction of the State, then the plaintiff was not bound to obey the notice, and commence his *action within the three months given him by the statute*." To which charge, counsel for defendant excepted, and alleges error in the same.

The jury returned a verdict for the plaintiff, for six hundred and fifty-seven dollars and thirty cents, with interest,

Whereupon counsel for the defendant moved for a new trial upon the following grounds:

1st. Because the Court erred in allowing the testimony of Asbury W. Jackson, John M. Robinson and others, as to the defendant having in his hands, property to secure him against the payment of the debt sued, to go to the jury.

2d. Because the Court erred in permitting the answer of Asbury W. Jackson, as to whom he understood the conversation between plaintiff and defendant to refer, to be read in evidence.

3d. Because the Court erred in charging the jury, that if the defendant asked indulgence upon the note from the plaintiff, after he had given the notice to sue, it was a revocation of the notice, and a waiver of his rights under the notice.

4th. Because the Court erred in charging the jury, that if the defendant asked indulgence on the note from the plaintiff after the notice was given, it was a waiver of the notice, there being no evidence before the jury that the defendant had ever asked any indulgence from the plaintiff for the principal in the note.

5th. Because the Court erred in charging the jury, that if there was any legal impossibility for the plaintiff to sue; that if the principal was beyond the jurisdiction of the State, then the plaintiff was not bound to commence his action within the three months given by the statute.

6th. Because the verdict was contrary to law.

7th. Because the verdict was contrary to evidence.

8th. Because the verdict was contrary to the weight of evidence.

Which motion was overruled by the Court, and counsel for defendant excepted.

MURPHY & CANDLER, for plaintiff in error.

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By the Court.—BENNING J. delivering the opinion.

Did the Court below err, in refusing the motion for a new trial, in this case? We think so. We think that one of the grounds of the motion, was good.

[1.] First ground. If the surety is in no danger, there is no reason why he should require the creditor to sue the principal; and if there is no reason why he should require the creditor to sue him, that is a circumstance tending, more or less, to show, that an allegation of his that he did require the creditor to sue him, is not true; or, to show, that he has waived the requisition, if he ever made it. Therefore, anything showing that the surety was in no danger, is admissible as evidence on the question whether he did or he did not require the creditor to sue the principal. The surety is in no danger, when he has in his hands, property of his principal, sufficient to pay the debt. Therefore, evidence of that fact, is admissible against him, when he pleads, to a suit brought against him or the debt, that he required the creditor to sue the principal, and the creditor failed to do so, for three months afterwards.

There is nothing then, we think, in the first ground.

Second ground. As to this ground, we prefer merely to say, that we do not deem it good.

Third ground. This was, we think, a good ground.

If the surety gives the creditor notice to sue the principal, and the creditor neglects to sue the principal for three months, the surety is "no longer liable," so says the statute. *Pr. Dig.* 471. If after a discharge, under this notice, the surety asks indulgence for the principal, that is no waiver of his notice. The notice has had its effect. And, in the present case, it was a question on the evidence, whether the request for indulgence, was not made after the expiration of three months from the notice to sue.

Again, if the surety, after having given the notice, asks indulgence for *himself*, not for his principal, that is no

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waiver of his notice to sue the principal. And here, it was open to question, whether the indulgence asked for, by Bailey, the surety, was not indulgence for himself, rather than indulgence for his principal.

We think, then, that the Court's charge, rather than what it was, should have been this, namely:

[2.] That "if the defendant, the surety, asked indulgence, from the plaintiff, after he had given the notice to sue, it was a waiver or revocation of the notice;" provided the time at which he asked the indulgence was before the expiration of the three months; and provided the indulgence was asked, not for himself, but for his principal.

Fifth ground. We doubt whether the evidence authorized the charge constituting this ground. But, as it is rather uncertain what the evidence on the point was, we say no more on that ground.

It is not necessary to decide or notice, the remaining grounds.

Judgment reversed, and new trial granted on the third ground.

JOHN H. HENEGAR, plaintiff in error, vs. JOHN S. SPANGLER, defendant in error.

Suitors are exempted from arrest while going to, attending on, or returning from Court. Nor does the fact that one of them resides out of the State, and who has had his adversary arrested, under bail process, previously, justify a departure from the practice.

Motion to discharge from custody, in Whitfield Superior Court. Decision by Judge CROOK, April Term, 1859.

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The parties in this case were both citizens of the State of Tennessee, and each sued the other in the Superior Court of Whitfield County, in the State of Georgia, each requiring bail. Spangler was served and arrested by the Sheriff in the suit against him. Henegar was not arrested at the suit of Spangler against him, but upon his return to Georgia, and while attending this present Term of the Court, as a suitor in his case against Spangler, he was arrested by virtue of the bail process, before sued out by Spangler against him, and he makes this motion to be discharged from said custody and imprisonment, on the ground that being in attendance on the Court as a suitor and party, he is privileged from arrest.

The Court refused the motion, and defendant excepted.

W. H. STANSELL; and J. A. GLENN, for plaintiffs in error.

FREEMAN, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The common law rule is recognized by the presiding Judge, that ordinarily the law exempts a *party* from arrest while going to, attending on, and returning from Court. But he considered that the circumstances of this case were peculiar, and justified a departure from the usual practice. These litigants were citizens of Tennessee; they met in Georgia; each sued out bail process against the other. Henegar succeeded in having Spangler arrested in vacation, and the Judge thought it but just that Spangler might have Henegar arrested during the Term, where he was in attendance as a suitor.

However right the thing was in itself, and I agree with Judge CROOK that it was so, still, inasmuch the law, as it stands, makes no such distinction, the exception will have to

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be grafted upon the common law principle, by the Legislature and not by the Courts.

We are compelled, therefore, reluctantly to reverse the judgment.

Judgment reversed.

F. M. JACK, for use, &c., plaintiff in error, vs. J. C. DAVIS,
defendant in error.

[1.] The assignee of a chose in action, not negotiable, takes it subject to all the equities, which existed between the assignor and the maker.

[2.] An infant should always sue and be sued in their own name, and appear by guardian or next friend. And if an infant fail or refuse to appoint one, the Court at the instance of the plaintiff, will do it for him.

Assumpsit, in Fulton Superior Court. Tried before Judge BULL, April Term, 1859.

This was an action of assumpsit, by Francis M. Jack, for the use of Jesse M. Butt, against James C. Davis, on a due bill given by Davis Jack, for one hundred dollars, dated 23d September, 1857.

The defendant pleaded as a set off, a balance due to him on an account, for goods sold and delivered to the plaintiff, Jack; said account running from 26th September, 1856 to 9th April, 1857, and amounting to \$271 13, and acknowledged to be correct and just by Jack.

The defendant further pleaded in abatement, the infancy of the plaintiff, Jack, before and at the commencement of the suit.

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first applied to the individual debts of defendant, before any could be applied to the payment of partnership demands or liabilities. His individual funds could not be legally applied to advances made by one partner for the partnership, until an account had been taken between the partners and a balance found against him.

The jury found for the plaintiff two hundred and forty, two dollars and six cents; whereupon, plaintiff moved for a new trial upon the following grounds:

- 1st. Because the verdict is contrary to the evidence.
- 2d. Because the verdict is decidedly and strongly against the weight of evidence, and without evidence to support it.
- 3d. Because the Court erred in the rulings and decisions on the evidence as above stated, and excepted to at the time.
- 4th. Because the Court erred in its charge to the jury.
- 5th. Because the verdict is contrary to the charge of the Court and the law.

The Court refused the motion for a new trial, and plaintiff excepted.

PEEPLES & CABANISS, for plaintiff in error.

DANIEL & DISMUKES; and ALFORD, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

This was a case where Johnson, the defendant, was seeking to diminish the demand of the plaintiff, Daniel, by showing that he had turned over notes to the plaintiff, with an understanding that they were to be applied as a credit on the notes sued on.

[1.] The plaintiff objected to the proof on that point. We can see no valid objection to its admission. It was rather vague to be sure, being an admission of plaintiff, that he had received notes to a certain amount to be applied to the defendant's indebtedment, without stating what indebt-

ment; but such as it was, it ought to have gone to the jury for what it was worth. It was said in the argument, that the notes turned over, were the best evidence of their amount, &c. It might as well be said that the bank-bills in which a payment happened to be made, were the best evidence of their amount. There was no attempt here to prove the contents, or any part of the contents of the notes turned over, and hence the rule, as to the best evidence, does not apply. It was a simple question of how much the plaintiff had agreed to credit on his demand.

[2.] The plaintiff offered in evidence, by way of rebuttal, certain copartnership notes of himself and defendant, in connection with evidence that the notes turned over were, by agreement between the parties, to be applied to defendant's part of such copartnership debts as had been paid off by plaintiff. This evidence was rejected, upon the ground that the notes appeared on their face to be firm notes, and therefore had nothing to do with individual transactions between the parties. This ground of objection loses sight of the issue. The question was, whether or not the notes turned over, were to be applied to the notes sued on. If they were by express agreement to be applied to *other* demands (without regard to what those others might be) it was evidence that they were *not* to be applied to the demand in suit. To show that the plaintiff *had* such other demands by producing them, was corroboration of his proof touching the agreement; and the evidence ought to have been admitted.

[3.] The plaintiff offered to read in evidence his own answer, as part of the entire record in a chancery suit, wherein Johnson was complainant, and Daniel was defendant; and upon objection made, the Court ruled it out. We think it was rightly excluded, for it did not appear, so far as we are informed by the record in this case, that the answer was responsive to the bill; if not, it could not be evidence for Daniel, even in the chancery suit, and it will hardly be sug-

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the sole use of said debtor, of which his creditors shall have no part or benefit; &c.”

The plaintiff submitted his proof, showing that he had been arrested by virtue of a *capias ad satisfaciendum* in 1853, and under proceedings had for that purpose, that he had taken the benefit of the honest debtor's Act; and proved by one or more witnesses, that he had notified defendant of his intended application, but no such notice could be found of file or record in the proper office, nor was defendant's name mentioned in the order of discharge, as one of the creditors who had been notified, although the names of many were therein contained, as having been served with such notice.

Plaintiff further proved, that defendant had sued out bail process against him on debts existing at the time of his discharge, as aforesaid, upon which he had been arrested and detained in custody, until he gave bail.

Plaintiff closed, and counsel for defendant moved for a nonsuit on the ground, that plaintiff had failed to prove notice, the order of discharge not containing the name of defendant as one of the creditors, who had been notified.

The Court sustained the motion, and granted the nonsuit, on the ground taken in the motion, and because no such notice had been filed in office as required by the statute. Holding, that to exempt plaintiff from liability to arrest by defendant, either the order of Court discharging him should have contained and recited the fact of defendant's notification, or the notice should have been filed in the Clerk's office, and entry thereof made on the minutes of the Court.

To which decision counsel for plaintiff excepted and assigned the same as error.

CLARK & LAMAR, for plaintiff in error.

L. T. DOYAL; and GEO. M. NOLAN, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the nonsuit right?

Is a creditor bound by the discharge of his debtor under the honest debtor's Act, unless it appears on the minutes of the Court, that he had due notice of the debtor's intention to apply for the benefit of the Act? If he is not bound, the nonsuit, it is clear, was right.

The question depends on the meaning of the following words in the fourth section of the honest debtor's Act: "Upon the appearance of such debtor or debtors, at the Court to which he is bound to appear, it shall be lawful for him, her, or them, either in person, or by attorney, to move the Court to be admitted, to take the oath prescribed for the relief of insolvent debtors, or to swear to the schedule previously filed with the Clerk of said Court, agreeably to the provisions of this Act, hereinafter contained; and it shall be the duty of said Court, upon such debtor or debtors making it appear to them, that at least ten days notice has been given in writing, to his, her, or their creditors, of the intention to avail him, her, or themselves, of the benefit of this Act, to administer the oath prescribed for the benefit of insolvent debtors, or to swear him, her, or them, to the schedule as aforesaid, as the case may be, and to direct the Clerk to make an entry of the same upon his minutes, which shall exempt the body of such debtor or debtors, from imprisonment for debt, in all cases where notice may have been given to the creditors, which notice shall be filed with the Clerk of said Court." (*Cobb's Dig.* 387.) To make an entry of the "same"—what does *same* stand for here? We think it stands for—represents—the *two* things previously mentioned—not only, the administering of the oath by the Court, but also, the making of it appear to the Court, that ten days notice has been given to the creditors.

If we are right in this, the "entry" which the word "same" requires to be made, is an entry to this effect—"A. B. this

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day came, and made it appear to the Court, that at least ten days notice, in writing, had been given to C. D. E. F.—his creditors, of his intention to avail himself of the benefit of the Act for the relief of honest debtors, and, thereupon, the Court administered to him the oath prescribed for the benefit of insolvent debtors, (or, swore him to his schedule, as the case may be.) In an entry to this effect, the names of the creditors appear. This is the sort of entry which, we think, is called for, by the word, "*same*."

What is to be the operation of the entry? It is to be, to "exempt the body" of the debtor, "from imprisonment for debt, in all cases where notice may have been given to the creditors." What cases are these—any others than those mentioned in the entry? We think not. The law, in the view which we have taken of it, requires, that the entry shall contain all the cases in which, it was proved, that notice had been given. It is to be presumed, therefore, that the entry does contain all of those cases. And the entry is matter of record—is, indeed, we may say, a judgment. Therefore, to allow the debtor to show, by parol evidence, that there were other cases than those mentioned in the entry in which cases, it was proved, that notice had been given, would be to allow him, to attack collaterally, a record—a judgment.

We think, then, that the operation, the entry is to have, is, to exempt the debtor, from arrest, by the creditors mentioned in the entry, but not to exempt him from arrest, by other creditors.

Our conclusion, then is, that the creditors who are mentioned in this entry, are the only creditors bound by it—at least, that this is so, until the entry, if erroneous, and amendable, shall have been amended in the regular way.

And with this conclusion, corresponds what was suggested in *Coleman & Starr vs. Dickerson*, (10 Ga. R. 551.)

Judgment affirmed.

NANCY GOODWYN, plaintiff in error, vs. NAPOLEON B GOODWYN, defendant in error.

A verdict is not unsupported by the evidence, where the evidence against the verdict is conflicting in itself, and where there is evidence in favor of it, consisting of the sayings of the person against whom it is rendered.

Trover, in Coweta Superior Court. Tried before Judge RICE, March Term, 1859.

This was an action of trover, by Napoleon B. Goodwyn against Nancy Goodwyn, to recover certain slaves, alleged to be in her possession belonging to plaintiff, who was her son.

At the trial, the plaintiff offered in evidence the following testimony, to-wit:

William Baily, who proved the number and value of the negroes in controversy, and that defendant had been in possession of them ever since he knew them.

William Beadles testified, that he knew Winey; she was about forty years old; not much acquainted with her; in 1846, in the latter part of the year, or in the first part of the year 1847, defendant was at the house of witness, and got into conversation about her daughter who was going to be married. I said to her, I suppose a certain lady has given Napoleon his walking papers; when defendant said, they need not do it, nor any other lady, for Napoleon had as much property as her father was able to give her; that Napoleon had some four or five negroes, and went on to mention Winey, Harriet and Caroline, and said that his grand-mother had willed them to him in Virginia. The negroes were in defendant's possession the first he knew of them, and were in her possession at the time of the conversation; witness has seen said negroes at her house, and at his own house. Witness knew only three of the negroes at the time alluded to, viz: Winey, Caroline and Harriet. Defendant said one got burnt and died in Virginia, that belonged to plaintiff; defend-

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ant said that the negroes belonged to plaintiff; that his grandmother had willed them to him, and that the will was proven and recorded.

Thomas G. King testified as follows: That he was at defendant's in 1845 or 1846, thinks it was in 1845, in October; was building a screw for defendant; conversed with defendant about a couple of yellow girls then in her possession; does not know their names. Spoke with defendant about Mrs. Simms, her daughter, who was sick; witness asked her why she did not send one of the yellow girls to wait on her daughter, Mrs. Simms; she replied they belonged to her son up the country, and that he was coming after them that fall. The yellow girls were nearly grown and very likely. Saw another negro woman about thirty or thirty-five years old. Mr. Simms had a cook and a little girl that stayed at the house, and another woman and some fellows who worked in his plantation.

James H. Graham testified as follows, viz: That King built a screw for William Beadles in 1845, and witness has always thought he built defendant's screw the same year; thinks he went from Beadles's to defendant's; thinks Beadles's screw was built in August or September; cotton was open; hands were picking cotton; thinks King stayed at Beadles's ten days or two weeks, perhaps more.

Plaintiff next introduced a copy of the will of *Mrs. Elizabeth Goodwyn*, the grand-mother of plaintiff, by which will the said Elizabeth Goodwyn bequeathed to him Winey and her children, subject to a trust deed on the children, under and by virtue of which said will, plaintiff claimed title to the property in dispute; which will bears date on the first day of October, 1830.

Plaintiff next introduced the testimony of *John R. Cross* taken by commission, which was as follows: Witness knows the parties; knows Winey, Caroline, Harriet, Julia and Ned does not know Martha and Antony; first knew them in Virginia at the house of Mrs. Nancy Goodwyn, in 1842; and has

known them from then until now, 1854. They were in Nancy Goodwyn's possession when he first saw them. Witness says that Nancy Goodwyn always said, until suit was commenced, that said negroes were the negroes of Napoleon B. Goodwyn. Witness has heard Nancy Goodwyn say, both in Virginia and Georgia, that said negroes were Napoleon's, and he heard her say this in 1842, 1843 and 1845. Said slaves were in defendant's possession at those times; he has lived in defendant's family; it was in 1842 and 1843. Defendant lived in Virginia, Brunswick county, and moved to Georgia in 1843. Thomas D. Goodwyn, Napoleon B. Goodwyn, Braddock Goodwyn, James Goodwyn, Henry Goodwyn, Louisa Goodwyn, Ann Eliza Goodwyn, Sarah Goodwyn, John D. Perkins, and witness, came with her to Georgia. There came with her also, fifteen or sixteen negroes that witness knew, to-wit: Bristol, Bill, King, Hamlin, Stephen, Rose, Mary Jane, Anny, Phebe, Charlotte, Winey, Caroline, Harriet, Ned and Julia. Witness was present when a proposition was made to buy Caroline, on the road from Virginia to Georgia, some where in North Carolina. Said proposition was made to Mr. Thomas D. Goodwyn, and he, in his mother's presence, (Mrs. Nancy Goodwyn,) referred the man wishing to purchase, to Napoleon B. Goodwyn, telling him that the negroes belonged to Napoleon. The purchaser then applied to Napoleon, and he told him that money could not buy her. Nancy Goodwyn, at the above mentioned place, made no reply, nor did she say any thing. Witness did not know the man who made the proposition referred to. Witness resided from 1839 to 1843 in Virginia. Witness always understood, and heard the defendant and family say, that the before specified negroes were Napoleon's; never heard defendant dispute his title to said negroes, while in her family nor any other one of the family.

To cross interrogatories witness answers: He knew all the negroes except Martha, Antony and Joe; knew them in Virginia and Georgia; has known them ever since 1842; they

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were in Nancy Goodwyn's possession when he first knew them, and in her possession when he last knew them. Defendant said that the slaves were Napoleon's at various times; does not recollect the days when he heard defendant say that the slaves were Napoleon's, but it was in the years 1842, 1843 and 1844. Has lived in the defendant's family; she did not control said negroes as she thought proper, but as Napoleon's negroes only. Does not know that plaintiff acquiesced, but he knew that she exercised control as above stated. Does not recollect that he ever heard plaintiff speak of hiring out said negroes and defendant objecting; never stated in his evidence in a former trial, that the last time he heard defendant say the negroes belonged to Napoleon B. Goodwyn, was in 1843. He never made use of any such expression at John W. Powell's nor at any other place.

Plaintiff next introduced the testimony of *Joseph B. Camp*, taken by commission, which was as follows: That he did sign the annexed instrument as a witness, and saw a copy of the same served upon defendant by plaintiff, on the evening of the 13th day of August, 1849, at defendant's own house in Coweta county, Georgia, and defendant refused to give them up, saying that they were not plaintiff's negroes. Plaintiff demanded the negroes of defendant at her own house in Coweta county, Georgia, and she refused to give them up. Witness further states that plaintiff charged defendant with having told him heretofore, that they were his negroes, saying to her at the same time: "Ma, do you not know you told me last fall they were my negroes? did you not tell me so?" To which defendant said nothing—placing, at the same time, her hands over her face, as if at a great loss to know what to say—when Thomas and Braddock Goodwyn spoke simultaneously, in a loud and angry manner, saying and repeating often; "No, she never; they are not your negroes; you shall never have them." And this produced quite an excitement, and at one time witness thought the parties would come to blows, but they did not.

Then follows a copy of the instrument attached to the interrogatories exhibited to said Camp, containing a demand for the negroes.

Plaintiff next introduced *Jack C. Lumpkin*, who testified as follows: That he knew Ned; worth twelve hundred dollars; about twenty years old, and worth for hire the last ten years, on an average of seventy-five dollars per annum. Witness saw Ned in Napoleon's possession; plaintiff got Ned from his mother; thinks he remained in plaintiff's possession about one year in Newnan, about his grocery; does not know where Ned went when he left plaintiff's possession; has never seen Ned since.

Plaintiff next introduced the testimony of *Elizabeth H. Edmondson*, taken by commission. She says she knew the parties; she was acquainted with the slaves Winey and Caroline, and a girl by the name of Harriet, who she understood was the child of Winey, and that she did not recollect to have seen any other children of Winey and Harriet. She says she heard Nancy Goodwyn say, that there were five negroes left to Napoleon by his grand-mother; these five negroes were Winey and her children. She is not positive; but thinks it was five negroes stated at the time by Nancy Goodwyn, as being the number, including Winey and her children. She states that it was about the first of September, in the year 1843, at the house of Mrs. Nancy Goodwyn, in the county of Coweta, when the conversation was had. She states that the said negroes were then at the house of Mrs. Nancy Goodwyn, and she presumed they were in her possession at the time; that she heard Mrs. Nancy Goodwyn say several times previous to the first of September, 1843, that said negroes, Winey and her children, were Napoleon B. Goodwyn's negroes. She states that she knew Caroline and Harriet; that they are mulatto girls; Caroline rather tall and Harriet of medium size; that she had seen Winey; that she is of dark complexion; that she does not recollect her size. The other children she knows nothing of. That the conversation was

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had with Mrs. Nancy Goodwyn in the month of September, 1843, at one time, and that she had heard her make about the same statement several times previous to the first of September, 1843, at the house of defendant; that no person was present besides witness at the time and place of conversation. That Napoleon B. Goodwyn had said that he would give all that he was worth or ever expected to be worth, for a certain gentleman to leave his wife, and then stated to witness the conversation referred to.

Plaintiff next introduced the testimony of *William Mitchell*, taken by commission. He says he knows the parties; that he resided on defendant's plantation, and overseed the slaves mentioned in the interrogatories, which were born in Virginia; that he has never heard defendant say any thing in relation to the ownership of said slaves; witness heard her say, in 1840, when the plaintiff proposed to hire out one of the slaves, that she could give as much for her as Mr. Foster, who proposed to hire her. The slaves were in possession of defendant; plaintiff lived with defendant till they moved to Georgia; plaintiff lived with his father until his death; he died in Brunswick county, Virginia, the place from whence his widow moved to Georgia. Don't know when the plaintiff's grand-mother, Elizabeth Goodwyn, died, or who died first. That he had loaned defendant money.

Plaintiff then introduced the testimony of *John D. Perkins*, taken by commission, which was as follows: Witness knew six of the negroes; knew them last in the possession of defendant in the State of Georgia; he never heard defendant say any thing about the ownership of said negroes; he resided with defendant while in Georgia as a visitor; left 15th November, 1845; knew nothing about the way in which the negroes came into the possession of defendant; plaintiff lived with his father until his death, and then resided with the defendant until she removed to Georgia; plaintiff lived with defendant about ten or twelve months after she removed

to Georgia; witness returned to Virginia on the defendant's business.

Plaintiff next introduced the testimony of *William H. Goodwyn* and *Stephen P. Pool*, taken by commission: William H. Goodwyn knew Winey as the slave of Burwell Goodwyn; knew she had children; does not recollect their number or sex; recollects nothing about the sale of said slaves.

Stephen P. Pool knows Winey and two of her children, Caroline and Harriet; Winey had other children, but he does not recollect their number or names. They were the property of Burwell Goodwin. Mrs. Elizabeth Goodwyn purchased Winey and all her children, except one, a boy, who was bought by Nathaniel Pegram, of Dinwooddie county, Virginia. Both witnesses say they are acquainted with all the parties named. William H. Goodwyn has read or heard read the original will alluded to, but it has been so long ago, that he does not recollect the contents of said will. He saw the original executed, and signed it as a witness; the original will was either written by Burwell Goodwyn, or Joseph Goodwyn, the executor, he does not recollect which—both being present when it was written. Both witnesses say they do not know where Napoleon B. Goodwyn lived during the whole time prior to the removal of his mother to Georgia; they think he resided a part of his time with his mother probably a greater part of his time with his mother; they think he was residing with his father at the time the will was executed, and in fact up to his father's death. Witnesses do not know the plaintiff's age at the time referred to. Stephen P. Pool knew he was living with his father at the time of the sale referred to. He never heard Burwell or Nancy Goodwyn say anything about the ownership of the slaves. Witnesses knew the late Col. Joseph Goodwyn died in June, 1838. He acted as executor of the will referred to. They believe the slaves were all the time in the possession of Burwell Goodwyn and his widow, up to the time of her removal to Georgia. They do not know whether or not it was with the assent of Col.

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Goodwyn that the slaves remained in the possession of Burwell Goodwyn to the time referred to, nor do they know any thing about his consenting to any legacy.

Answers to Cross-Interrogatories: *Stephen P. Pool* said, he knew nothing to prove it a sham sale; was present at the sale and knew it was not a sham sale. It has been a long time since the sale; that he cannot now recollect whether he saw any money paid by purchasers or not. He never heard Burwell Goodwyn, Mrs. Nancy Goodwyn, or any of the parties, except Mrs. Elizabeth Goodwyn, in the matter specially mentioned, say anything about said slaves after the sale. Both witnesses say, as far as they know, possession was never interrupted by the executor. They do not recollect that they ever heard him say any thing on the subject.

Plaintiff next introduced the testimony of *Abram V. Wells* and *Exavia Foster*, taken by commission, which was as follows: Abram V. Wells knows all the parties, and was well acquainted with Burwell Goodwyn, the person referred to in said interrogatories. He knew the woman Winey, referred to, knew she had children, had seen them often, but did not know them by name. Remembers having heard the said Burwell Goodwyn and Nancy Goodwyn, all since the year 1830, say that the slaves referred to, had been purchased by Mrs. Betsy Goodwyn, and by her given to Napoleon B. Goodwyn. Witness Wells further states, that he heard each of them boast how well Napoleon would be off. He does not remember having heard Burwell Goodwyn speak of his right of possession. He heard Mrs. Nancy Goodwyn say, since the death of her husband, that the said slaves belonged to Napoleon, but he does not recollect the time when he last heard her say so, but is satisfied it was since the death of her husband. Witness further states that after said sale above mentioned, Burwell Goodwyn was considered insolvent; that he knew he was largely indebted, and if he had claimed the property, his creditors would have levied

on it; that he did some business for the said Goodwyn, and knew that such was the fact.

Answers to Cross-Interrogatories: Witness knows that Winey was the name of the woman formerly owned by Burwell Goodwyn; that he never heard Burwell Goodwyn say he held them under his mother for the benefit of his children; but that he heard Burwell Goodwyn say the said negroes belonged to Napoleon. That he cannot recollect when he last heard Burwell Goodwyn speak of it; but he heard him speak of it since the said sale; that he never heard Mrs. Goodwyn say that said negroes were paid for by her husband's money, or that they belonged to her children, but that she always said that said negroes belonged to Napoleon; that he cannot recollect the last time that he heard Mrs. Goodwyn speak of the matter; that she (Mrs. Goodwyn) was in the habit of visiting his house, and that he there heard her often speak of the said negroes.

Ezavia Foster, answers as follows: He knows the parties in said cause, and was intimate in the family, but that he did not know Burwell Goodwyn; he died before he moved to Brunswick; he knew the woman Winey and her children, Caroline and Harriet; that she might have had other children; that he did not recollect them; that he never saw Burwell Goodwyn; that he heard Mrs. Nancy Goodwyn frequently say since her husband's death, that the said Winey and her children belonged to Napoleon, that they were purchased by his grand-mother and given to him. He cannot say the exact time when he last heard her speak of the matter, but that he is satisfied he heard her say as much a short time before she left Virginia. That he did at one time make application to Napoleon to hire Caroline, but that he is not distinct in his recollection as to the circumstances; he thinks he first applied to Napoleon, and he referred him to his (Napoleon's) mother, and when he consulted her, she told him to see Napoleon, saying the negroes belonged to Napoleon. The conversation took place at Mrs. Goodwyn's. He could

not recollect the precise time, nor could he say whether Napoleon was present when he spoke to his mother.

Answers to Cross-Interrogatories: That he does not know they are the same negroes, but that Winey, Caroline and Harriet were the names of three negroes in Mrs. Goodwyn's possession, claimed by Napoleon; he repeats, he never saw Burwell Goodwyn, he never heard Mrs. Goodwyn say the negroes were purchased with her husband's money, but she always said the negroes were Napoleon's; that he could not say the last time he heard Mrs. Goodwyn speak of said negroes, that he heard her speak of them repeatedly in her own house and in presence of all the family. That Mrs. Goodwyn visited his, witness's house, very often, and that he has heard her there say the negroes belonged to Napoleon. The witness cannot recollect who was present when he spoke to Mrs. Goodwyn about hiring the girl Caroline, or whether any one; that the conversation occurred at Mrs. Goodwyn's house.

Plaintiff next introduced the testimony of *Wm. H. Goodwyn* and *Stephen P. Pool*, taken by commission. *Pool* answers, I never have examined the original will of Elizabeth Goodwyn, deceased; I am acquainted with the hand writing of Burwell Goodwyn, deceased; I have seen him write divers times; I have seen writing that he acknowledged to be his; I have not examined the will as before stated; I never heard Burwell Goodwyn say he wrote the will; I know the negroes Winey and Caroline, and they were bought by Elizabeth Goodwyn; I do not know who carried them to Georgia; I do not know who took them away from Virginia; they were in the possession of Nancy Goodwyn after the death of Burwell Goodwyn; I never heard Burwell Goodwyn nor his wife say anything in regard to the ownership of said slaves, Winey and Caroline.

Answers to Cross-Interrogatories: *Pool* answers, I was not present at the writing of the will, and know nothing of any conversation that took place; I do not know for what

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purpose they were willed to said Napoleon, I know nothing of an agreement to shield them from said Burwell Goodwyn's debts; I never did hear said Elizabeth say or Burwell Goodwyn, in her presence, uncontradicted by her, that such an arrangement was made; I know nothing about the deed of trust, its place of deposit or what has become of it, for whose benefit, or that there ever was one made; I know but little of Winey and children; after I had them sold, never saw them but once afterwards. Wm. H. Goodwyn answers, that he never examined the original will of Elizabeth Goodwyn though he witnessed it; he is not acquainted with the hand writing of Burwell Goodwyn; has seen him write, saw him write the last will of Elizabeth Goodwyn, to which he was a witness; never heard Burwell Goodwyn make any allusion to the will of Elizabeth Goodwyn; knows the slave Winey alluded to; does not know who carried her to Georgia; does not know whose possession they were in, in Virginia after the death of Burwell Goodwyn.

Answers to Cross-Interrogatories: Witness was present when Elizabeth Goodwyn made her will; he was quite young at the time; does not recollect the conversation that passed between Burwell Goodwyn and Elizabeth Goodwyn on the occasion, and did not know, at the time, any of its contents; he does not know for what purpose or why Winey and her children were willed to Napoleon B. Goodwyn; has never heard, as well as his memory serves him, Elizabeth Goodwyn say any thing in respect to the matter; he knows nothing in relation to the deed of trust or what has become of it; he does not know that the said deed of trust was made for Burwell Goodwyn and his children's benefit; he does not positively know the said negroes remained in Burwell Goodwyn's possession after said Sheriff sale, but thinks they did; does not know how long said negroes were in possession of Burwell Goodwyn, if at all; is not positive but thinks said slaves, Winey and her children, were in the possession of Burwell Goodwyn at the time Elizabeth Goodwyn made her

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will; does not know positively that said slaves remained in said Burwell Goodwyn's possession up to the time of his death, but supposes that they did; he never heard defendant claim said negroes; cannot answer anything of his own knowledge in reference to the possession of said negroes by Burwell Goodwyn or Nancy Goodwyn after the Sheriff sale; has never heard Elizabeth Goodwyn say anything in reference to Winey and her children being given to said Napoleon for the purpose of securing them from debts of said Burwell Goodwyn; never heard Elizabeth Goodwyn mention a trust deed or anything relating to it; recollects nothing of the deed of trust; never heard Elizabeth Goodwyn say she bought Winey and her children at Sheriff sale and paid for them with Burwell Goodwyn's money.

Plaintiff next introduced the testimony of *Nathaniel J. Pegram*, taken by commission; witness answers as follows: I knew Napoleon B. Goodwyn when a little boy, also his mother, Mrs. Burwell Goodwyn, but do not recollect her given name; he is the grandson of Mrs. Elizabeth Goodwyn; was present at the sale referred to; a number of negroes were sold, among them, if I remember rightly, a negro woman named Winey and her children; how many cannot state; the prices the negroes sold for do not recollect; I bought one of the negroes, a very small boy, named John; if I had any other connection with the sale, do not recollect it; cannot state that Elizabeth Goodwyn did, in person or through an agent, pay for the negroes bought at the sale; he answers, my answer to this question is embodied in my answer to the third question; he answers, I cannot state that the property was sold by the Sheriff, but such is my recollection; cannot state who the Sheriff of Brunswick county was at the time the sale took place in Brunswick county, Virginia; cannot state that Mrs. Elizabeth Goodwyn was at the sale; he saw Skepeth M. Oliver there at the sale; does not know that he bid for or bought any of the negroes; Oliver resided in Dinwooddie county, Virginia; witness and Burwell Goodwyn

were not, at the time of the sale, nor previously, on terms of intimacy.

The plaintiff having closed his case, the defendant offered in evidence the following testimony, to-wit:

A copy, duly certified under the act of Congress, of the record of a judgment and an execution issued thereon, obtained on the 6th day of April, 1829, in the Superior Court of law, for the county of Dinwooddie, State of Virginia, in favor of Etheriel Crowder, assignee of Stephen P. Pool, against Burwell Goodwyn and Stephen P. Pool, which execution showed a seizure and sale of Winey and Caroline, two of the negroes in dispute, and the ones from which all the rest of the negroes in dispute descended, by Wm. M. Gill, Deputy Sheriff of Brunswick county, State of Virginia, and the purchase of said negroes, Winey and Caroline, at said sale, by Skepeth M. Oliver, at the price of three hundred dollars.

William M. Gill's Interrogatories: Knows the parties. John Tucker was Sheriff of Brunswick county, Virginia, in the years 1828 and 1829, and to March 1830, the deputies of said Tucker, during said period, were Charles Trumbull, Wm. J. Buford, Thos. M. Buford, Edward B. Tucker and witness. Witness further states, that he knew of the sale of Winey and her child Caroline, sold as the property of Burwell Goodwyn in the year 1829. Witness levied the execution and made return and sale, to the best of his recollection; said sale was made under a writ of *fieri facias* from the Clerk's office of the Superior Court of law, for the county of Dinwooddie, State of Virginia, in the case of Etheriel Crowder, assignee of Stephen P. Pool vs. Burwell Goodwyn and Stephen P. Pool; said sale took place in the county of Brunswick, Virginia, on the 6th day of June, 1829, at the residence of Burwell Goodwyn, and at his request; to the best of his recollection and belief, the negro woman and her child, were purchased by Skepeth M. Oliver; the negroes were present

at the sale, and I do not recollect that I made any formal delivery of them; said execution was fully satisfied, and there was no complaint from any of the parties.

To the *Cross-Interrogatories*, he answers: That Skepeth M. Oliver was the highest bidder and the negroes, Winey and her child Caroline, were knocked off to him; he, the said Oliver, satisfied the execution; whether he paid his own money or that of another person, I do not know; as witness before stated, his return on said execution shows that it was satisfied by Oliver and witness; knew no other person in said transaction; said negroes were in the possession of Burwell Goodwyn at the time of levying the execution, and in witness's possession until they were sold at the time and place before stated, and he has no recollection about any reasons being given about delivery of possession; the sale was conducted as Sheriff's sales usually are, and when the purchase money was paid. Witness further states, that a true copy of the execution, in the case of Etheriel Crowder, (identical with that contained in the record, with the entries thereon introduced in evidence by defendant,) assignee of Stephen P. Pool vs. Burwell Goodwyn and S. P. Pool, which witness states is a part of his deposition, is a true and perfect copy, and that the entries are true and perfect.

Defendant next introduced the testimony of *Skepeth M. Oliver*, taken by commission. Witness answered, that he was well acquainted with Col. Burwell Goodwyn and his wife, Nancy Goodwin, and the family; that he purchased two negroes, viz: Winey and Caroline, at Sheriff's sale, on the plantation of said Burwell Goodwyn, in Brunswick county, Virginia; said sale was conducted by Sheriff Gill in May, 1829, as well as witness recollects; he, witness, purchased said negroes for said Burwell Goodwyn, at his request, and he paid the purchase money to the Sheriff; witness bid off the negroes, Winey and Caroline, and did not take any bill of sale for them, nor did he deed them, or in any way convey them to any person but Col. Burwell

Goodwyn; settled with the Sheriff for them and took possession of them. Witness states further, that his father was unwell and sent him up to buy the negroes in for said Burwell Goodwyn.

Answers to Cross-Interrogatories: Witness means by purchase, that he bought the negroes, Winey and Caroline, in for the said Burwell Goodwyn, at his request; that he paid no money for them; but Col. Burwell Goodwyn paid for them the sum of three hundred dollars; he was at that time in possession of sundry property. Witness further states, that his father was unwell and sent him, and that he bought in said negroes, Winey and Caroline, for said Burwell Goodwyn, at his request, and he saw him pay the money; witness never deeded or gave any bill of sale for said negroes, from the fact that he purchased them at the request of Burwell Goodwyn, and he paid the purchase money and took the negroes into possession. The reason that he, witness, did not make any bill of sale or deed to the property, was, that he bought them at the request of Burwell Goodwyn, and for him the said property was levied on to satisfy an execution in favor of E. Crowder, assignee of Stephen P. Pool, who was present at the sale.

Thomas D. Goodwin, examined as witness for defendant; witness states as follows: That he was the son of the defendant, was born in 1813; was three years older than plaintiff; knew Winey and Caroline; Winey nursed him, and was always in possession of Burwell Goodwyn, his father; from his first recollection till his said father's death; was present at said Sheriff's sale; Winey and Caroline were sold at said Sheriff's sale by Wm. M. Gill, deputy Sheriff, on the plantation of Burwell Goodwyn, in Brunswick county, Virginia; said sale was public; Skepeth M. Oliver was present and bid off said negroes at said Sheriff's sale. Burwell Goodwyn sent for Oliver. Negroes went back into Burwell Goodwyn's possession, and remained in his possession till he died on February 14th, 1835; were never in the possession of

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Mrs. Elizabeth Goodwyn since witness's recollection. Said Sheriff's sale took place in 1829; never knew of the said negroes being sold at other Sheriff's sale; the negroes, after Burwell Goodwyn's death, went into defendant's possession, and have remained in her possession ever since. Defendant moved from Virginia to Georgia in 1843, and brought negroes along. Soon after Burwell Goodwyn's death plaintiff claimed the negroes. Defendant denied his right to said negroes. Plaintiff procured a copy of grand-mother's will, and claimed the negroes under said will. Defendant observed to plaintiff that his father's money paid for said negroes, and plaintiff did not deny it; also, told plaintiff that the negroes belonged as much to other children as to him; that in 1843, in Georgia, plaintiff proposed to hire the negroes to defendant for \$200 00, then on her refusal to hire them, offered to take \$50 00, and finally offered to take five dollars, when defendant told him she would not hire her own negroes; that when plaintiff came back from Tennessee, in 1847, plaintiff and Braddock Goodwyn spoke, in presence of defendant and family and witness, of renting land and farming together. Plaintiff was asked where he was going to get negroes to work his land, he replied that he was going to take these negroes, that they were his. Defendant then told him that he had no negroes. These negroes were never in plaintiff's possession or controlled by him. Witness stated to Davis Owen, in 1845, when he wished to buy one of said negroes, that his mother could not sell the negro, as she was claimed by plaintiff; he did not tell said Owen that said negro belonged to plaintiff, who was then up the country. Mrs. Elizabeth Goodwyn died in October, 1830. Witness's father died in debt; no administration was taken out on his estate, because of the old claims outstanding against him; that plaintiff lived with Burwell Goodwyn till his death, then with defendant till he went back to Virginia. Plaintiff did not return till about Christmas, 1846; went to Virginia on his mother's business. Witness could not state

whether he had sworn, on a former trial, that Elizabeth Goodwyn had purchased said negroes.

John W. Powell was next sworn for defendant, and stated, that he had a conversation with plaintiff, in 1848 or 1849, in relation to said negroes now in dispute; that in said conversation he, witness, charged upon the plaintiff, that he knew that his grand-mother willed the negroes to him to shelter them from his father's debts, and for the benefit of his father and his family or his father and children, which he, plaintiff, admitted was so; that he knew nothing of a compromise or treaty pending before the conversation with plaintiff and his said admission. That he, witness, had no authority, from any one, to make a compromise, and knew of no effort to compromise; that he was a brother-in-law of plaintiff. The said conversation was in relation to the negroes in dispute. Plaintiff offered to sell witness his grocery in Newnan, which cost one thousand dollars, and his interest or claim in the negroes in dispute, for \$1,500. Witness offered to give it if he, plaintiff, could make a good title to the property, to which plaintiff made no reply; that the negroes were then worth from three to four thousand dollars. Witness approached plaintiff with the view of bringing about a compromise, and to prevent a suit. Witness was son-in-law of defendant. That his wife was dead. Parties afterwards agreed to a compromise, but it was afterwards broken off.

Braddock Goodwyn, sworn for defendant, says: That he heard plaintiff offer to hire the negroes, in dispute, to defendant in the year 1843, and that he came down as low as five dollars, and she refused to give it, saying to plaintiff that she would not hire her own negroes; and again, in 1847, he, witness and plaintiff, were about to go to farming together, and that plaintiff was asked where he was going to get negroes to work on said farm; plaintiff replied that he would take the negroes in dispute, that they were his; defendant replied that he would do no such thing; that he,

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plaintiff, had no negroes; defendant was all the while in possession of said negroes, exercising acts of ownership over them. In 1848 or 1849, plaintiff requested defendant to let him have Ned to wait on him, and defendant permitted plaintiff to take Ned for this purpose; and some eight or ten months afterwards defendant instructed witness to bring Ned home again, and that he, witness, went to plaintiff and got Ned and returned him to defendant; plaintiff was present when he took Ned for the purpose of taking him back to defendant, and made no objection. Witness also stated that plaintiff remarked that he would quit the case if his lawyers would let him; they had paid out money for him, and would not let him quit.

Henry C. Goodwyn, sworn for defendant, says: That in the year 1843, plaintiff was about leaving for the State of Virginia, and proposed to hire the negroes, in dispute, as low down as five dollars, and defendant refused, stating that they were her negroes; also, that in the year '51 or '52, plaintiff stated that he would abandon his case, but that his lawyers had paid out money for him, and would not let him do it. Witness also proved value of property and hire, &c., and that defendant had been in possession of said negroes ever since he could remember.

Tax-Book.—Defendant here introduced the tax-book, from which it appeared that plaintiff gave in no negroes.

Here the defendant closed.

In rebuttal by plaintiff—*Davis Owen*, sworn, says that in 1845, he informed Thomas D. Goodwyn that he would give eight hundred dollars in gold for negro girl Caroline, and that Goodwyn replied that she could not be sold, that she belonged to plaintiff, who was, at that time, at or near Nashville, Tennessee.

The parties having closed, the Court charged the jury as follows:

The plaintiff, in this action, deduces title to the negroes in controversy from Elizabeth Goodwyn's will, and the re-

covery is resisted, on the ground that the title to Winey and Caroline was never in the testatrix, and this is the issue to be determined from the evidence. If you should believe, from the evidence, that Elizabeth Goodwyn, at the time that she made her will, and at her death, had the title to the negroes in dispute, then she could convey that title to the plaintiff by her will, and the jury ought to find a verdict for the plaintiff. On the other hand, if you should believe, from the evidence, that Mrs. Elizabeth Goodwyn, at the time of her death, had no title to these negroes, then she could convey none, and you ought to find a verdict for defendant. Verbal admissions should be received with great caution by the jury, and may be explained and avoided; when they are made by a party in ignorance of his rights, the law will not hold them binding. The mere verbal admissions or declarations of the defendant, that these negroes were the property of the plaintiff, will not, in law, invest the plaintiff with the title to the property, so as to enable him to recover in this action without other evidence of title thereto on his part. If Mrs. Goodwyn continued to retain the possession of the property and exercise the control and dominion over it as the owner of such property—if the negroes were the property of Burwell Goodwyn, at the time of his death, then they constituted a part of his estate after his death; and the declarations and admissions of defendant could not divest the estate of title to the negroes; it follows, of course, that such declarations and admissions cannot invest title in plaintiff. If the jury should believe, from the evidence, that these negroes were the property of Burwell Goodwyn before and at the time of Sheriff's sale; and, if you further believe, from the evidence, that at the Sheriff's sale that they were purchased by Elizabeth Goodwyn, and that the purchase money was paid by her, then the title to the property vested in her. On the other hand, if the jury should believe that said negroes were purchased, at said sale, by Burwell Goodwyn or some one else for him, and that his money paid for

them, and he retained the possession of them until his death, then they were his property and belonged to his estate. The question is, if there was a sale, who paid the purchase money? and, in deciding this question, you ought to give the most credit to those witnesses who had the best opportunities of knowing the facts about which they testified. If Burwell Goodwyn wrote Elizabeth Goodwyn's will, or acquiesced in its provisions, that circumstance would not invest her with title to the property, nor would such a result be produced by any verbal declaration or admission made by him to the effect that the property was hers. It is also true, that the verbal declarations or admissions of Burwell Goodwyn, or of the defendant, that the property is or was plaintiff's, could not invest plaintiff with the title thereto. After all that any of the parties may have said, the question should be decided according to the real truth of the case, and the question recurs, who paid the money at said Sheriff's sale? and whose money was it? When a party pays money the law presumes that it was his own money, but it may be proved by circumstances, who paid the money.

The jury found for the plaintiff the negroes in dispute and the hire; whereupon, counsel for defendant moved the Court for a new trial, on the following grounds, to-wit:

1st. That the said verdict is contrary to law and the charge of the Court.

2d. That the verdict is contrary to the evidence.

3d. That the verdict is unsupported by the evidence.

4th. That the verdict is contrary to the decided weight and preponderance of the evidence; which motion the Court overruled and passed the following order:

Although the Court does not feel satisfied with the verdict in this case, yet it does not believe it is so decidedly against the weight of evidence, and the jury being satisfied with it, the Court will not disturb it.

Whereupon the counsel for the said defendant, excepted to said decision overruling said motion for a new trial.

SAMUEL FREEMAN; and ROBERT W. SIMMS, for plaintiff in error.

BUCHANAN, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

The sole question presented to us is, whether this verdict is supported by the evidence, and this question is still further narrowed down to the single point—whose money paid for the negroes in controversy? If the money of Mrs. Elizabeth Goodwyn paid for them, then they were her property, and Napoleon was entitled to recover them under her will. If her money did not pay for them, she had no title, and he, claiming only through her, had no better, and was not entitled to recover them. Upon this point the evidence is conflicting, preponderating perhaps against the verdict, but not sufficiently so to authorize us to overrule the jury, especially as the presiding Judge who heard the witnesses, and saw the whole trial refused to disturb the verdict. The occasion on which Mrs. Elizabeth Goodwyn bought these negroes, if at all, was a Sheriff's sale in Virginia. The defendant in trover, Mrs. Nancy Goodwyn, introduces the testimony of the persons connected with that sale. The Sheriff testifies (and so is his return on the execution) that the negroes were bid off and paid for by one Oliver, while Oliver testifies that he bid them off, but that *Burwell Goodwyn* paid for them and took them. This is the substance of the whole case as made by Nancy Goodwyn. It is of importance to remark that it conflicts with itself. But how does it stand with the evidence produced by Napoleon? He proved by a great number of witnesses, that Nancy Goodwyn had constantly said through a long series of years, that the negroes were *his*. She was his mother; she was the widow of Burwell, and had doubtless derived her knowledge of the facts from her husband, who knew all about it. Her opportunities, therefore,

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for knowing the truth were ample, better perhaps than those of any other living person. We think she can scarcely complain that the jury found, she had through that long series of years, been speaking truth, and not falsehood.

Judgment affirmed.

DENNIS GREEN, WILLIAM JACK, and JAMES M. SPADDEN,
tenants in possession, plaintiffs in error, vs. LITTLETON
D. GLASS, and SAMUEL BARNETT, lessors, defendants in
error.

A deed purporting to be signed, sealed and delivered, in the presence of two witnesses, was admitted to record upon the affidavit of one of them that he saw the grantor sign, seal and deliver the deed at the time, and for the purposes therein mentioned; that he saw the other sign the same as a witness, and that he signed the same as a witness, also; each in the presence of each other.

Held, That the probate was sufficient.

Ejectment, in Catoosa Superior Court. Tried before
Judge CROOK, May Term, 1859.

This was an action of ejectment to recover lot No. 164, in the 28th district and third section of originally Cherokee county.

Plaintiff submitted his proofs and closed, when defendants, amongst other things, tendered in evidence a deed for the premises in dispute, from Littleton D. Glass, the grantor, to William B. Mann, dated 6th February, 1838. This deed purported to have been executed in the State of Alabama, Barbour county, the residence of the grantor, Glass, and

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"signed, sealed and delivered in the presence of these witnesses.

Test, LEVI GLASS,
THORNTON G. KENT.

This deed was recorded in the Clerk's office of the Superior Court of Walker county, 14th April, 1861, upon the following affidavit made by one of the witnesses before a commissioner appointed by the Governor of the State of Georgia to take acknowledgement of deeds in the State of Alabama, to-wit:

STATE OF ALABAMA, MONTGOMERY County.

Before me Charles A. T. Price, commissioner of deeds, appointed by the Governor of the State of Georgia, to take acknowledgement of proof of deeds for said State of Georgia, personally appeared the within named Thornton G. Kent, who being sworn on oath, says he saw the within named grantor, Littleton D. Glass, sign, seal and deliver the attached and foregoing deed to the said William B. Mann, on the day and year, and for the uses and purposes therein expressed, and that he saw Levi Glass sign the same as a witness, and that this deponent signed the same as a witness; also in the presence of each other.

(Signed) THORNTON G. KENT.

Sworn to and subscribed before me, this 17th day of October, 1851, under my hand and seal.

CHARLES A. T. PRICE, Com'r. [SEAL.]

Plaintiff objected to the introduction of this deed, without further proof of its execution, on the ground that the affidavit of Kent, one of the witnesses thereto, did not state that the other witness to said deed was present at its execution. The Court sustained the objection, and rejected the deed, and defendants excepted.

The jury found for the plaintiff, whereupon defendants

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moved for a new trial on various grounds, one of which was, that the Court erred in rejecting the deed above mentioned.

The Court refused to grant a new trial, and defendants excepted, and assigned said refusal as error.

AKIN; and WALKER, for plaintiff in error.

CULBERSON; and DOUGHERTY, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

A new trial was moved for in this case, on several grounds, and refused by the Court, and it is to reverse this decision that this writ of error is prosecuted.

We think the witness, Johnson, was permitted to go too far perhaps, in being allowed to state that he knew the land in dispute from the directions given to him by Murray, who had once owned it; and likewise, in stating as he did, that one of the persons on the land informed him that his own family, and the family of the other tenant, were living on the premises. But these are minor matters, and we should not feel inclined to reverse the judgment on these grounds.

The main question in the case is, was the Court right in ruling out the deed from Littleton D. Glass to William D. Mann, on the ground that it was not sufficiently proven?

The deed was witnessed by Levi Glass, with the word "test" annexed to his name, and by Thornton G. Kent. It purports to be "signed, sealed and delivered in the presence" of these witnesses. It was admitted to record upon the affidavit of Thornton G. Kent, who swore "that he saw the grantor, Glass, sign, seal and deliver the deed to William D. Mann, on the day and year, and for the uses and purposes therein expressed; and that he saw Levi Glass sign the same *as a witness*, and that he, the deponent, signed the same *as a witness*, also *in presence of each other*."

The objection to the probate is, that it does not show that

Levi Glass was present at its execution. The Court sustained the objection, and ruled out the deed.

Kent deposes that he saw Levi Glass sign the deed "as a witness." Witness of what? Of course, of its execution; and that he signed the same as a witness; "also in the presence of each other." This latter clause may mean, that the witnesses only signed in the presence of each other. It may also mean that all three, the grantor and two witnesses, signed in the presence of each other. This would be no forced construction. It as legitimately means the one as the other, and knowing, as we do, that to hold this probate insufficient would shake the titles to half the real estate in Georgia, we should struggle to uphold, rather than to defeat the probate.

Putting aside the record, if these witnesses were dead or beyond the reach of the Court, there can be no doubt but that this deed would be admitted in evidence upon proof of the hand-writing of the witnesses; and yet, the evidence of its execution would be much weaker in the case supposed, than the case as it is. The attestation clause is unusually full. Glass even subjoins the word "test" to his name, which *ex vi termini* is significant of the fact that he witnessed the execution of the deed. The probate precludes the supposition, both that the grantor did not sign in the presence of the witnesses, and they in his.

Besides, Kent deposes, that he saw the deed delivered. This of course, was subsequent to its attestation. Littleton D. Glass then adopted the attestation. Where is there room for fraud or imposition?

We deem it unnecessary to pronounce any opinion upon the fourth ground in the motion for a new trial. With the deed of Glass to Mann in evidence, the title is with the defendants.

Judgment reversed.

Chapman et al. vs. Gordon et al.

**WILLIAM W. CHAPMAN, and others, plaintiffs in error, vs.
WILLIAM L. GORDON, and others, defendants in error.**

The owner of the land on which, the city of Griffin stands, laid it out, into streets, squares, and lots, some of the latter for building lots, some for public purposes, some for churches; according to a plan. Afterwards, the owner sold the building lots at auction, and caused it to be proclaimed at the sale, that the lots were sold according to that plan. Deeds were made to the purchasers, but nothing of the matter stated in the proclamation, was put into them. Afterwards, ten months or more, the owner made a deed in fee, to the Baptist church for the lot set down on the plan, for the Baptist church. In this deed, nothing was said, as to preventing the Baptist church, from using the lot for other purposes, than those of worship. The Baptist church was not, by agent, or otherwise, present at the auction. The Baptist church entered on the lot, erected a house of worship, and, some time afterwards advertised a part of the lot for sale, with a view to raise money to build a better house of worship on another part of the lot. Certain lot owners in the city of Griffin, filed a bill against the church, to prevent it from so doing. They claiming, that they had, in the facts aforesaid, an easement in the lot, that it was never to be used for any other purpose, than that of a place of worship.

Held, That the facts were not sufficient, to give them a title to such easement.

In Equity, in Spalding Superior Court. Tried before Judge CABANISS, May Term, 1859.

The facts of this case are fully stated in the following opinion of the Court:

By the Court.—BENNING J. delivering the opinion.

The complainants claim, in the lot in controversy, what we may call an easement, that the lot shall ever be used as a Baptist Church lot, and never be used as a lot for any other purpose.

The title on which, they rest this claim, is, according to their bill, whatever title can result from the following facts: The land on which Griffin stands, was by the Monroe Railroad and Banking Company laid off into lots, streets and squares, according to a certain plan, for a town, and subsequently became a town according to that plan—

the present town of Griffin. In the plan certain parts of the land were marked off for streets, and for a public square; certain parts for building lots, certain parts for a burial ground, a parade ground, a Court house; and certain parts as sites for churches. In 1840, the land, in lots, was set up at auction according to this plan. Copies of the plan were circulated among the persons present. Lewis L. Griffin, the President of the road, in a public speech, with the map in his hands, stated that the church lots aforesaid, "were set apart reserved and dedicated by said company, for the use of the public, for the purposes specified in said map, and that those purchasing business, or residence lots, would likewise purchase an interest in said streets, alleys and public lots," (meaning by public lots, to include the church lots,) to be used for the public purposes therein designated, and not otherwise; and the said Lewis L. Griffin, in the said speech aforesaid, stated, that as soon as the different denominations of christians should take possession of the lots dedicated to them, for the use of themselves and the public, that said company would make them deeds, to the same, conditioned, that said lots be used by said denominations and the public generally, as sites for houses of religious worship, but for no other purpose whatsoever. And the said Lewis L. Griffin, on the day aforesaid, and before, and afterwards, while acting as the agent of said company, in selling said lots, "stated that the object of said company in locating the lots in said city, for religious, educational, and other, public purposes, where they did locate them, was to confine the business of said city along, or near, the line of railroad" "running through said city, the entire length of Broad street, according to said original plan."

The auction then commenced and numerous building lots were sold to various persons; afterwards, all, or nearly all, of the remainder, were sold. The purchasers took possession, and thus was made, the town of Griffin.

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The complainants are citizens of Griffin, owning lots with valuable improvements on them.

The lot set apart to the Baptist church, was accepted by the church, and in 1845 or 1846, it erected a house of worship on the lot. This lot the church has now subdivided into seven lots which it has advertised for sale.

The sale of the lot in this way, will injure the property of the complainants as they think.

The title of the complainants, is, according to their bill, the title, whatever it is, which results from these matters of fact.

The answer does not admit, that all of these matters are facts. It denies, that Griffin said, that the deeds to the churches should have the conditions in them, as charged in the bill. It admits, that Griffin said, that the church lots were to be dedicated for the use of the churches, but denies that he said, they were to be dedicated "*to the public* for the use of said churches." It denies that Griffin said, that purchasers would purchase "an interest in said church lots." The answer says, that the church received a deed conveying to it, the land in fee, and that the church is intending to sell a part of the lot, not the whole, with a view to raise money, for the buiding of a better house of worship, on another part of the lot.

There was no evidence going to show, that Griffin said, that the deeds to the churches were to have conditions in them, to prevent the churches from using the lots for any other purpose than worship.

There was evidence, that the deed made to the Baptist church, was "a common deed," and without any conditions. The date of the deed, was shortly after the Baptist church was organized, and, it was organized in March, 1841. This was nearly a year after the auction.

There was no evidence, that any of the deeds to any of the purchasers of building lots, contained clauses conveying the easement in question, to such purchasers.

These are the materials out of which the complainants are,

if they can, to deduce this title to what they claim, the easement aforesaid, in this Baptist church lot.

Are they materials of out of which, such a title is deducible?

They consist merely of the sayings of Griffin, at the auction. And first, how are those sayings to be understood? As importing this—"I" (the vendor) "now sell these lots, according to this plan which I hold in my hand, and *I bind myself*, that, as the lots, streets, and squares, now stand in the plan, so shall they forever stand in the city, like a petrified forest?" Or, as importing this; "I now sell these lots, according to this plan which I hold in my hands and I suppose that the city will remain according to the plan, but I make no warranty, as, what I say is but matter of opinion." The sayings are certainly susceptible of the latter import. And that is a natural and reasonable import, whilst the other, is extravagant and unreasonable. Subsequent conduct of all parties, favors the notion, that this was the import. If the first was the import, it was a matter making a part of the contract of purchase, and a most important part, and therefore, it was a matter, that should have entered into all the deeds made to purchasers, seeing that the statute of frauds requires agreements conveying land, to be in writing. Yet there is no such matter in any of those deeds. They, so far as appears, were deeds conveying unconditional fees, to each purchaser, to the lot he purchased, and conveying to him, nothing in the lots purchased by others. This of itself is strong, to show, that Griffin was *understood* as not speaking the language of *contract* but as speaking the language of mere *opinion*.

Say, however, that he was understood as speaking the language of contract, as binding himself, or the company, to keep the lots, &c., forever down to the plan, yet, he was *only speaking* and the statute of frauds, says, that words, *merely spoken*, in relation to land, are not a good foundation for an action against the speaker. True, there may be

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things, to take such words out of the statute; as, fraud, or mistake; but unless there is something to take them out, they remain within the statute, and so, are of no effect. Is there any thing here, to take these words out of the statute. What is it, if there is? Did the deeds of the purchasers of building lots, fail, by fraud or mistake, to contain a stipulation, by which each purchaser of a lot, was to have an easement in every other lot, in every square, and in every street, that such other lots, and squares and streets should forever remain as they were? Nothing of the sort is pretended.

But, if it were possible, to make, out of the facts, a case of fraud as against Griffin or as against the Railroad Company, it is not possible to make out one as against innocent purchasers, from the company, without notice of the fraud or mistake. And such a purchaser, for aught that appears, was the Baptist church. Neither it, nor any agent of it, was present when Mr. Griffin spoke the words; the church could not be, for it was not even organized as a church, until some ten months after the auction. Still later was it, when the church took its deed, and that is "a common deed," containing no unusual stipulation. The church then, so far as appears, was an innocent purchaser. If so, it is not the church, if it is any one, that the complainants must look to, for redress.

True what the complainants claim is only an easement in this church lot, but there is the same law, for the conveyance of easements, that there is, for passing any other kind of realty incorporeal. There must be a writing, there must be a grant. True this grant may be implied from circumstances; as long user with the knowledge of the owner of the land in which the easement is claimed, but without circumstances, it cannot be implied. Cases of fraud stand on their own footing.

See *The King vs. the Inhabitants of Herndon on the Hill*, 4 M. & S.; *Wood vs. Leadbetter*, 13 M. & W.; *Hewlins vs.*

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Shipman, 5 B. & C. 221; *Fentiman vs. Smith*, 4 East 107; 5 Taunt. 125; 3 Kent. Com. 450.

Upon the whole, we think, that there are not materials in this case out of which, the complainants can make a title to the easement they claim.

Thus thinking, we can of course, find no error in the charge, or, in the verdict. The charge was, if anything, too favorable to the complainants.

It is needless to stop, to show, that if we are right, the charge was not erroneous. That is almost self-evident.

Judgment affirmed.

WILLIAM A. NESBIT, plaintiff in error, vs. WILLIAM J. CAUTRELL, et al., defendants in error.

A. had a judgment on B. founded on a debt he held on B. C. as A's agent or attorney, for collecting the debt, was to receive ten per cent. as commissions, on the amount collected of the debt.

Held, That C. was not a party or a privy to the judgment, and therefore, that it was not admissible as evidence against him.

Trespass, in Gordon Superior Court. Tried before Judge CROOK, April Term, 1859.

This was an action of trespass by William A. Nesbit, against William J. Cautrell and John R. Taylor, for entering plaintiff's close, and seizing, and taking therefrom, some two hundred and fifty bushels and several stacks of wheat, &c.

Defendants pleaded the general issue, and further that defendant, Taylor, was a constable, and seized upon the wheat as the property of James A. Nesbit, under and by virtue of an execution against him.

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At the trial, both parties submitted their evidence, and the jury found for defendants; whereupon plaintiff moved for a new trial upon the grounds:

1st. Because the verdict was contrary to evidence.

2d. Because the verdict was contrary to the weight of evidence.

(3d & 5th ground stricken out by the Court, as not being consistent with the facts of the case.)

4th. Because the Court excluded the record of a claim case in a Justice Court, between one Obediah C. Campbell, plaintiff in *fi. fa.*, against James A. Nesbit, defendant, and William A. Nesbit, claimant, involving the title of the same wheat, and, by which it appeared that the wheat was found not subject to said *fi. fa.* against James A. Nisbet.

The Court overruled the motion for a new trial, and plaintiff excepted and assigned said refusal as error.

FRANCIS, for plaintiff in error.

DABNEY, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in refusing to grant the motion for a new trial?

We think, that there was sufficient evidence to support the verdict; consequently, that the first two grounds of the motion are not good.

As to the fourth ground—Cautrell was not a party to the judgment in the justice's Court, or, in privity with any person who was a party to that judgment. True, he was to receive, as pay, for collecting the note on which the judgment was founded ten per cent. on the amount collected; but this did not make him part owner of the note—owner of ten per cent. of the note; it merely made the amount collected on the note, a thing by which his compensation was to be measured. The contract was like the commis-

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sion contracts usually made by attorneys for collecting debts, and it was never supposed that those contracts make the attorneys part owners of the debts.

Judgment affirmed.

RICHARD ROE, casual ejector, and MATTHEW COGGIN, tenant in possession, plaintiff in error, vs. JOHN DOE, ex dem., STEPHEN JONES, and others, defendants in error.

[1.] A new trial will not be granted by this Court on the ground that the verdict is unsupported by the evidence, in a case where the evidence is highly conflicting, and a new trial is refused by the presiding Judge.

[2.] A new trial will not be granted on the ground of newly discovered evidence, where the evidence so discovered, is merely cumulative.

Ejectment, in Pike Superior Court. Tried before Judge CABANISS, October Term, 1858.

This was an action of ejectment by Doe, upon the several demises of Bivins, Burrows, Lewis, Spurlin, and Jones, against Roe, casual ejector, and Coggin Gregg, and Matthew Coggin, tenants in possession, for the recovery of sixteen acres of land, on the east side of lot of land No. 177, in the ninth district of Pike county.

The case being submitted upon the testimony and charge of the Court, the jury found for the plaintiff the premises in dispute.

Defendant moved for a new trial on the grounds, that the verdict was contrary to law and evidence, and against the weight of evidence, and because of newly discovered evidence.

The Court refused to grant a new trial, and defendant excepted.

The opinion of this Court contains all the facts necessary to a correct understanding of the case.

GIBSON, for plaintiff in error.

FLOYD; and G. J. GREEN, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] The main question in this case is, whether the verdict has sufficient evidence to support it. We think it has. The dispute was as to the dividing line between adjacent lots No. 177, and 176; the plaintiff being owner of the first, and the defendant of the last. The beginning point being the north-east corner of 177 and north-west corner of 176, was undisputed. The corner at the opposite end of the dividing line, being the south-east corner of 177, and the south-west corner of 176, was the point of dispute. There were no line trees pointing to either the corner claimed by the one or that claimed by the other, and the plaintiff had the advantage of corresponding with the *course* called for in the plats of both lots. So far, the evidence is in favor of the plaintiff. Again, the line claimed by plaintiff, when extended through the brace of lots lying immediately south of 177 and 176, coincides with the dividing line between those southern lots. Now these two southern lots call for the same corner as the other two, and for a dividing line running the same course as the dividing line between 177 and 176—that is to say, the dividing line between the one set of lots, is but an extension of the dividing line between the other set—just as it turns out to be on running to the corner claimed by the plaintiff. This is a strong circumstance. Neither of the corners as claimed is now to be found. Mr. Spurlin testifies, that he knew the corner tree twenty-five or thirty

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years ago, and that it had marked upon it the numbers 177, 176, and 175, indicating it to be the corner of those lots. He said it stood where the defendant claims the corner now to be. This is of course strong evidence for the defendant. But Mr. Spurlin is contradicted by another witness who says he had seen and examined the same tree about which Mr. Spurlin testified, and that it had no numbers on it; and still by another witness who says Mr. Spurlin told him he knew nothing about the corner. This statement Mr. Spurlin says he does not remember. The other evidence for the defendant consisted of admissions by the plaintiff, recognizing the line as claimed by defendant. This is the substance of the evidence. It is highly conflicting. The presiding Judge was satisfied with the verdict, and we cannot see sufficient reason to disturb it.

[2.] The newly discovered evidence was clearly merely cumulative, and this ground was not urged in argument.

Judgment affirmed.

JAMES F. JOHNSON, plaintiff in error, vs. **THE BANK OF FULTON**, defendant in error.

Whenever a protest is not required, notarial expenses cannot be recovered.

Certiorari, in Fulton Superior Court. Decision by Judge **BULL**, at April Term, 1859.

James F. Johnson brought suit in a Justices Court against the **Bank of Fulton**, on five bank bills, each of the denomination of five dollars, and sought to recover, in addition to the

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amount of the bills, the expenses of protest of each bill. The defendant pleaded the general issue; and specially that plaintiff was not entitled to recover the fees of the notary public, for noting and protesting the bills. Each bill was presented at the bank and payment demanded on each separately, and refused, and each was separately noted and protested.

At the trial in the Justices Court, plaintiff offered in evidence the certificate of the notary public, to prove the demand and protest, which, upon objection was rejected by the Court, upon the ground, that a protest was not necessary, and the bank was not therefore liable for the cost and fees of said notary. To which ruling plaintiff excepted, and the case coming up before the Superior Court by certiorari, that Court dismissed the certiorari, and affirmed the judgment of the Justices Court. To which decision plaintiff excepted and assigns the same as error.

STONE & FITCH, for plaintiff in error.

HILL, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

We think the Judge below was right, in holding that notarial fees cannot be recovered of the bank in this case, for the reason, that no protest was necessary, upon the failure of the bank to redeem its bills on demand. The agency of a notary may be very convenient in such a case; but it was not necessary. And this is the true test to apply. Whenever a protest is not required, notarial expenses cannot be recovered. *Lefty vs. Mills*, 4 T. R. 175; *Windle vs. Andrews*, 2 Burn. & Ald. 696; S. C., 2 Stark. Rep. 425; *Miller vs. Hackley*, 5 John. Rep. 375; *Yonge vs. Bryan*, 6 Wheat. Rep. 152; *Union Bank vs. Hyde*, Ibid. 573; *Merrit & Myers vs. Benton*, 10 Wend. 117; is the only authority cited, adverse

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to this proposition. The opinion of the Court in this case, occupies nine or ten lines. The Court confesses that it is unsupported by authority, except the practice of the Circuit Court, and that is not uniform, and puts the decision upon untenable ground namely: that the fees of protest, is an expense, to which the holder of the note is subjected, by reason of the default of the endorser, who ought to have paid the note at maturity; that it may fairly be considered, as a charge incident upon the endorser's failure to perform his contract, and hence should be allowed to the plaintiff in the assessment of damages. Whereas, the endorser, in New York, and by the law merchant, is not liable to the holder, until demand is made of the maker, and he has been notified. Until then, he is in no default.

Judgment affirmed.

CHARLES ROSS, plaintiff in error, vs. BENJAMIN F. HAWKINS, administrator, and JANE A. KING, administratrix of JONAS KING, deceased, defendant in error.

Since the new bail Act of 1857, giving sureties the right of having their principals bailed immediately, the surety has no necessity to resort to a *ne exeat* against his principal. Bail accomplishes the same purpose, and the remedy on the common law side of the Court being equally adequate, a resort to equity will not be sustained.

In Equity, in Polk Superior Court. Decision by Judge HAMMOND, at April Term, 1859.

This was a bill by Hawkins, and Jane A. King, administrator and administratrix of Jonas King, deceased, against

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Charles Ross, and alleges that complainants were appointed administrators of said Jonas, in the year 1838, and that their intestate, sometime prior to his death, united with the defendant in several promissory notes, amounting in the aggregate to a large amount, and that his name appears as one of the principals to said notes, when he was in fact, only the surety, and that defendant is really the principal, and alone received the consideration therefor; that said notes are due, and defendant fails and refuses to pay them.

The bill further states, that defendant owns a considerable number of slaves and other property; that he has recently carried a part of said slaves out of the State, for the purpose of avoiding the payment of these demands, and that complainants believe and charge, that he will run or carry off the remainder of his negroes and other property, and will remove himself and effects beyond the limits and jurisdiction of the State; that said defendant, by thus leaving the State and removing his property, designs to force the creditors holding the aforesaid notes to resort to the estate of complainant's intestate. The bill prays for a writ of *ne exeat*, &c. The writ of *ne exeat* issued, and defendant entered into bonds, conditioned not to depart the State, without the performance of the final decree which might be made in the case.

Afterwards, defendant demurred to the bill, and also filed his answer.

At April Term, 1859, the cause coming on to be heard on the demurrer, and a motion to discharge the *ne exeat*, the Court overruled the demurrer, and refused the motion to dismiss.

To which decision and refusal counsel for defendant excepted, and assigns the same for error.

CHISOLM & WADDELL, for plaintiff in error.

PRINTUP & HARVEY; and W. AKIN, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

We think the *ne exeat* ought to have been dismissed. The Act of 1830, *Cobb's Dig. p. 527*, provides that in all cases of *ne exeat* the defendant shall be discharged upon giving bond with good security, *either* that he will not depart the State, *or* pay the eventual condemnation money. The defendant has his *option*, and therefore all that is *secured* to the complainant by this process, is the presence of the defendant within the State. The *same thing* is secured to him by the new bail Act of 1857, in favor of securities—*Acts of 1857, p. 110*; and his remedy being as good elsewhere, he has no necessity to resort to a Court of Equity. It was said in argument, that a resort to equity was necessary, in order to obtain a discovery of the fact of suretyship. That discovery has already been had, and there was no necessity to retain the bill for that purpose, even if it could not be had equally well on the common law side of the Court. Besides all this, for myself, I think the affidavits in this case are too vague and flimsy to support a *ne exeat*.

Judgment reversed.

REUBEN SCOTT, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Under an indictment for keeping a gaming house, defendant does not relieve himself by showing that he had rented out the house before the gaming was done, when it appears that the house was in his possession when the gaming occurred.

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Indictment for keeping a gaming house, in Gordon Superior Court. Tried before Judge CROOK, April Term, 1859.

The plaintiff in error, Reuben Scott, was indicted for keeping a gaming house; he pleaded not guilty. At the trial, *Robert Hackney*, testified: That he knew of persons playing cards in a house side by side with the house that Scott lived in, and that it was his understanding that Scott was in possession of said house, but he could not say positively; he further testified, that he did not believe that Scott kept the house for the purpose of gaming, but that he kept beds and a table or tables for the accommodation of boarders and persons who put up with him on public occasions; that he stepped into the house one day in 1857, and found Gilbert H. Longstreet dealing faro, and told him that they would ruin Scott; they were playing with the doors open, and about one-third of the town boys were looking on; Longstreet replied, that he boarded there, and had rented the room from Scott and slept in it, and it was his room and not Scott's, and that Scott was not responsible for the playing. He was present at different times and saw Scott playing cards with others in the year 1858, in said room, both before and after the time that Longstreet stated that he had rented the room.

John Huggins testified: That he thought that it was sometime in the fall of 1856, or spring of 1857, that he played a game of cards with Scott in a house that he supposed was in Scott's possession, but he could not say positively whether he was in possession or not. If Scott ever kept a gaming house he did not know it.

The testimony being closed, counsel for the defendant requested the Court to charge the jury, "that if from the evidence, they should come to the conclusion, that the house was rented by defendant for two years previously to the finding the indictment or presentment, then the defendant could not be found guilty under the statute for '*keeping a gaming*

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house,' unless it was proven that he rented it for that purpose."

The Court refused to charge as requested, but charged that it made no difference whether the defendant had the exclusive possession of the premises or not, *if he used* it for the purpose of gaming, although rented to another occasionally, he was guilty, whether it was rented with the intention that it should be so used or not.

To this charge and refusal to charge as requested, defendant excepted.

The jury found the defendant guilty, whereupon he tenders his bill of exceptions, assigning as error, the charge and refusal to charge as above stated.

PARROTT, for plaintiff in error.

JOHNSON, Sol. Gen., *contra*.

By the Court.—STEPHENS J. delivering the opinion.

The charge asked by the counsel of Scott in this case, would have been right if the indictment had been for *renting* out a gaming house; for then the purpose for which Scott had rented out the house would have been the gist of the matter. But the indictment was for *keeping* a gaming house, and if he controlled the house and used it for gaming, it was very immaterial whether he had, before that time, let somebody else have it on rent or not. If the house was in his possession when the gaming took place in it, with his consent, he was guilty. The Court substantially so charged.

Judgment affirmed.

McDaniel vs. Walker.

HENRY W. McDANIEL, plaintiff in error, vs. CHARLES WALKER, defendant in error.

- [1.] The Judge is justified in giving a charge respecting the credibility of a witness who discloses on the stand the fact that he has been guilty of the *crimen falsi*.
- [2.] When there is evidence enough to authorize such a charge, there is enough to sustain a verdict adverse to the credit of the witness—it would be error to present to the jury the opportunity of finding a verdict which could not stand when found.
- [3.] A defendant in a motion for a new trial can (generally) avail himself of only such defences as he has made during the trial.

Complaint, from DeKalb Superior Court. Tried before Judge BULL, April Term, 1859.

This was an action originally by Walker, as bearer, against John H. Morris, principal, and Henry W. McDaniel, security, on twelve promissory notes, each for thirty dollars, dated 21st February, 1853, and due 25th December, thereafter.

There was a verdict for plaintiff at common law, and the security, McDaniel, appealed. The defence relied on by the security was, that plaintiff had given indulgence, and extended the time of payment of said notes, in consideration of an extra per cent. or usury paid by the principal. That this indulgence was given without the knowledge or consent of the security, and operated as a discharge of his further liability on said notes.

At the trial, on the appeal, the principal, Morris, was examined as a witness, being first released from payment of cost. He proved that he wrote and sent to Silas Mosely, the original owner and payee of the notes sued on, the following letter, viz :

“ ATLANTA, ——— 7th, 1854.

Mr. SILAS MOSELY,

Dr. Sir : I inform you that I am willing to stand security on them notes of J. H. Morris until he takes them up.

Yours, &c.,

(Signed)

H. W. McDANIEL.”

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This witness further testified, that he wrote this note and signed McDaniel's name to it without his knowledge or consent—in other words, that he forged McDaniel's name to the letter.

The testimony being closed, the Court charged the jury, that if Mosely, the payee of said notes, for a consideration, agreed with John H. Morris, the principal, to give day of payment, and did so, in pursuance of said agreement, without the consent or knowledge of McDaniel, the security, that McDaniel was discharged from all liability on said notes, and they ought to find for the defendant, provided they believed the witness, John H. Morris. That a witness's credibility might be impeached by his manner of testifying, or when he testified to an act on his part inconsistent with moral integrity. That they were the sole judges of the degree of credibility which ought to be given to the testimony of said witness, and they had the right to believe or disbelieve his testimony. That in determining how far his credibility ought to be affected by the act disclosed, they might consider whether he intended to act fraudulently, or whether he believed his act would be ratified by McDaniel. To the latter part of which charge counsel for defendant excepted.

The jury returned a verdict for plaintiff, for the amount of the notes; whereupon, counsel for defendant, during the said Term, and before adjournment thereof, moved for a new trial in the said cause, on the following grounds:

1st. Because the jury found for the plaintiff the full amount of said notes, when the testimony showed there was usury in the same.

2d. Because the finding of the jury was against the charge of the Court.

3d. Because the verdict of the jury was without any testimony to support it, and against the weight of evidence.

4th. Because the finding of the jury is against the law and against the evidence in said cause.

5th. Because the Court erred in charging the jury, that

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they were the judges, and sole judges, of the credibility of the testimony of the witness, Morris, there having been no witness introduced to invalidate his testimony, nor any contradictory statements of his proven on the trial.

Which motion was overruled by the Court, and counsel for defendant excepted.

EZZARD & COLLIER, for plaintiff in error.

GLENN & COOPER, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

There are three assignments of error in this case.

[1.] That the Court erred in giving the jury any charge at all upon the credibility of the witness, Morris, because he was not impeached either by another witness, or any contradictory statement of his own; and so there was no evidence authorizing a charge on that point. This assumes that the credibility of a witness can be effected only in the two modes stated—an assumption which can not be sustained. On the contrary, it may be affected and broken down in many ways. One reason for disbelieving a witness is, the impossibility or improbability of his story; and another reason for discrediting him is, the very one which existed in this case—his own disclosure of an act which exhibits moral turpitude in himself, especially such an act as falls under the denomination of *crimen falsi*. His note to Mr. Mosely was a falsehood, or his statement about it to the jury was one. There is no escape from this alternative. The Judge was, therefore, authorized by the evidence, we think, to give the charge he did.

[2.] And this disposes of another assignment that the Court erred in refusing a new trial, on the ground that the verdict was unsupported by the evidence; for if there was evidence enough to authorize the Judge to give the charge as to Morris's credibility, there was enough to sustain the

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verdict. It would have been error to have submitted that issue to them, if there had not been enough evidence to warrant a finding adverse to the witness's credibility. It would be futile, indeed, to present to the jury the opportunity of finding such a verdict as could not stand when found.

[3.] As to there being usury in the notes, it is sufficient to say, that the fact depended solely on the testimony of this same witness, and the jury were authorized to reject his evidence. Nor does it appear that McDaniel made any point, or asked any charge on the subject of usury *during the trial*. He can not now complain of any errors except such as tended to hurt his line of defence.

Judgment affirmed.

BENJ. J. WILSON, plaintiff in error, **vs. JAMES J. MORRISON**, defendant in error.

An action was brought on an instrument in the following words: "\$177. On or by the 25th Dec., 1855, I promise to pay B. J. Wilson, or bearer, one hundred and seventy-seven dollars, with interest from date. This 19th June, 1853, for value received; said note to be paid out of a certain note, I have this day traded to said Morrison, on L. B. Perryman, when collected, due at the same time as the above. J. J. MORRISON." There was no evidence that the Perryman note had been collected, or that it might have been collected, by the use of due diligence.

Held, That a nonsuit was right.

Complaint, in Polk Superior Court. Nonsuit by Judge **HAMMOND**, April Term, 1859.

This was an action by Benjamin J. Wilson, against James J. Morrison, on the following written instrument, which plaintiff sued on and described in his petition as a promissory note, viz:

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"\$177. On or by the 25th December, 1855, I promise to pay B. J. Wilson or bearer, one hundred and seventy-seven dollars, with interest from date. This 19th Dec'r, 1853, for value received; said note to be paid out of a certain note I have this day traded to said Morrison, on L. B. Perryman, when collected, due at the same time as the above.

(Signed)

J. J. MORRISON."

Plaintiff tendered and read in evidence the above instrument and closed; and counsel for defendant moved for a nonsuit, on the ground that the paper sued on was not a promissory note. The Court sustained the motion and awarded a nonsuit, and plaintiff excepted.

FIELDER & BROYLES, for plaintiff in error.

CHISOLM & WADDELL, *contra*.

By the Court.—BENNING J. delivering the opinion.

Did the Court err in granting the nonsuit? We think not.

The instrument declared on, is so absurd as it stands, that we may assume it to contain a mistake. It is probable, that it was Wilson who drafted the instrument, and, that he, by inadvertence, forgetting that he was writing for Morrison, used the words, "a certain note, I have this day traded to said Morrison," instead of the words, a certain note, the said B. J. Wilson has traded to me.

Assuming this supposition to be true, did the Court err, in granting the nonsuit?

What, on this supposition, does the instrument mean? This, we think: That Morrison promised to pay Wilson \$177 by the 25th day of December, 1855, out of a note, on Perryman, "traded" by Wilson to Morrison, provided, the note should, by that time, be collected, but if it should not be, then to pay him the \$177 when the note should be collected and not before. The promise was a promise to pay out of

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the proceeds of the note, and out of them only. This we think, the most natural and obvious meaning of the instrument. Therefore, in the absence of *aliunde* evidence of a different meaning, we must say, that this is the meaning.

Taking this, as the meaning, it is obvious, that the nonsuit was right, for there was no proof, that the Perryman note had been collected, or that it might, by the use of ordinary diligence, have been collected.

We think then that the nonsuit was right.

Judgment affirmed.

HUGH C. METTS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

A defendant on the criminal side of the Court is entitled to a continuance of his case, when it is called within a few days after the alleged offence, and he puts in an affidavit stating material evidence which he avers to be in possession of witnesses who are out of the county, and whom he had no opportunity to subpoena.

Indictment for assault and battery, in Whitfield Superior Court. Tried before Judge CROOK, April Term, 1859.

Hugh C. Metts was indicted for an assault and battery upon his wife. When the case was called for trial, he moved for a continuance on two grounds: First, because he had not had time or opportunity to prepare for trial; that indictment was found against him on Tuesday morning of this present week of the Term of the Court, for an offence alleged to have been committed the Saturday before.

2d. On account of the absence of two material witnesses, residing in Whitfield county, but who had gone the day be-

fore on a visit to Floyd county, and he could not have subpoenaed said witnesses since the finding of the indictment against him. That he expected to prove by said witnesses, that he had not been guilty of maltreatment of his wife; that he and his wife remained together all the evening and night after the alleged difficulty, and that their conduct towards each other was kind and affectionate, and that Mrs. Metts said he had done nothing but what he ought to have done; that these witnesses were at defendant's house the same night.

Defendant also requested a postponement of the trial for two days, in order to send for the witnesses at his own cost, and to go to trial during the Term.

The Court refused to continue or postpone, and ruled defendant on to trial; to which ruling defendant excepted.

The trial proceeded, and defendant was found guilty.

Whereupon, he tendered his bill of exceptions, assigning as error the refusal to grant the continuance aforesaid.

GLENN; and MILNER & PARROTT, for plaintiff in error.

Sol. Gen. JOHNSON, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

The affidavit for a continuance in this case, shows that the defendant had *material* evidence which was not absent by his fault. The case ought to have been continued, or the witnesses brought to Court.

Judgment reversed.

**WILLIAM J. LAWTON and GILBERT BOX, plaintiffs in error,
vs. FARLEY B. ADAMS, defendant in error.**

One joint tenant cannot maintain ejectment against another, unless the defendant does something which amounts to a disclaimer of the title of his co-tenant, or which is inconsistent with his right of property, in the premises.

Ejectment, in Floyd Superior Court. Tried before Judge HAMMOND, February Term, 1859.

This was an action of ejectment by Farley B. Adams, lessee, against William J. Lawton and Gilbert Box, tenants in possession, to recover lot of land No. 272, in the fourth district and fourth section of originally Cherokee, now Floyd county.

The action was commenced in April, 1849. In March, 1853, the declaration was amended laying a demise to plaintiff for the one undivided half of said lot, and from which defendants have ejected him.

Defendants pleaded the general issue, and the statute of limitations.

The jury found for the plaintiff one undivided half of the land described in the declaration, and five hundred dollars for *mesne* profits. Whereupon, defendants moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to evidence and against the weight of evidence.

2d. Because the verdict was contrary to law.

3d. Because the Court erred in refusing to charge the jury, that the amendment of the declaration in 1853, did not and could not relate back to the commencement of the suit, and if the statute of limitations was a bar in 1853, the defendants are protected.

4th. Because the Court erred in refusing to charge the jury, that one joint tenant or tenant in common, cannot maintain ejectment against his co-tenant, without proving an actual ouster.

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ter or refusal to let him into possession. But charged, that it was necessary that there should be an ouster, but it might be proved by any act on the part of defendants, that amounted to an assertion of title to the whole premises, such as refusing to let plaintiff into possession, selling the whole, &c.

5th. Because the declaration could not be amended, after the action was barred by the statute of limitations.

6th. Because seven years possession under title or color of title, creates a perfect title in defendants, and plaintiff cannot recover in ejectment.

7th. Because the amount found by the verdict for *mesne* profits is excessive, contrary to and not supported by the proof, and the jury made no allowance for improvements made by defendants, and plaintiffs could not recover for *mesne* profits prior to his amendment in 1853.

8th and 9th. Because one joint tenant or tenant in common, cannot recover from his co-tenant without giving notice of his title, and proving demands, and actual ouster, or refusal to admit him into the possession, and there was no evidence of such notice, demand, and ouster or refusal.

10th. Because title must vest at the time the service is laid, and the declaration cannot be amended afterwards.

The Court overruled the motion for a new trial, and defendants excepted.

W. J. LAWTON; and UNDERWOOD, for plaintiffs in error.

A. J. HANSELL; and WARREN AKIN, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

There are ten assignments of error in this bill of exceptions; but when simmered down, there are in fact but three points in the case.

1st. As to the ruling of the Court, respecting the allowance of the amendment made in 1853; and the effect of that

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amendment upon the plea of the statute of limitations, we see nothing wrong.

2d. As to the *mesne profits*, this was a question of fact for the jury; and the evidence being conflicting, we would not disturb the verdict upon that ground. But,

3d. We must think, the verdict of the jury contrary to law, and that a new trial should have been awarded, for the reason, that until the repudiation on the trial, by Farley Adams of his deed to Hudson, on the plea of infancy, he, Lawton, the vendee of Hudson, held the land in dispute, not as the co-tenant of the plaintiff, Adams, but in severalty. And that no act or declaration of Lawton's, made prior to the commencement of the suit, can be relied on, to entitle Farley Adams to maintain this action against him, as joint tenant. In other words, that inasmuch as one joint tenant cannot bring ejectment against another, until the co-tenant in possession, has said or done something which amounts to a denial of the right of the other tenant, and Lawton was holding in severalty when the action was commenced, and the plea of infancy set up and sustained; there was no cause of action at the time the suit was brought, and the case must on that account fail.

The plaintiff and his brother, the acknowledged owners of the land, convey it to Hudson, and Hudson to Lawton. Lawton treats it as his own, as he had a right to do. The first demand made by Farley Adams, one of the feoffors, to be let into the land, is a writ. He seeks to protect his possession under the joint deed from Farley Adams and his brother. In reply to this, Farley Adams plead infancy to his deed, and the jury find for the plea, and then for the first time, he becomes in law, the joint tenant with Lawton; Lawton's title was good until this act of repudiation. It was optional with the plaintiff to disaffirm or not, the title which he had made. But not having done this, until after he had sued, his action was premature. It may be, that Lawton may prefer to surrender, or rather to let Adams in, rather than incur the ex-

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pense of litigating. He is entitled to the opportunity or choice of doing so. Should he continue to resist the right of Adams, the suit will be resumed, and the present action will constitute a demand to sustain it.

It may look hard to oblige Adams to submit to the payment of costs in this case; and be kept out of his rights still longer, after so much delay has occurred. But reason as well as all the analogies of the law, sanction and require it. In most cases, one may demand their rights by suit, without any previous request. But in all such cases, the obligation rests upon the defendant to tender satisfaction. But in trover, there must be proof of conversion, or of a demand and refusal, from which a conversion will be inferred, before an action will lie. If an overseer agrees to work for a part of the crop, a demand must be made before he is entitled to compensation in money.

By pleading infancy in this case, the plaintiff has put himself upon strict law, he cannot complain therefore, if strict law be meted out to him. The law governing this case, is definite and definitely presented. It may well be asked, why did not Farley Adams before suing, notify Lawton, that he disaffirmed the conveyance to Hudson, and claimed to be let into the joint occupancy of the premises?

Judgment reversed.

WILLIAM WIMPEE et al., plaintiffs in error, vs. DANIEL R. MITCHELL, administrator, defendant in error.

W. & P. were partners in trade. P. dies and W. gives a mortgage to his representatives, to secure P's estate in the payment of an individual claim; and

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also to indemnify it against the payment of the firm debts. The mortgaged property is sold and the money brought into Court. It was not pretended, but that the estate of P. was solvent.

Held, That the creditors of the firm, were not entitled to have this fund withheld from the administrators of P., and applied directly to their demands.

In Equity, in Floyd Superior Court. Decision by Judge HAMMOND, February Term, 1859.

This bill was filed by the administrators of William T. Price, deceased, alleging, that he in his lifetime was in partnership in the grocery and carriage and blacksmith business, with one William Wimpee; that complainants and Wimpee, after William T. Price's death, entered into an agreement by which all the assets of said firm, amounting to over ten thousand dollars, were to be turned over to Wimpee, to take charge of the same and to pay and discharge the debts due by said firm, amounting to over five thousand dollars, and further agreeing to execute to complainants, as administrators aforesaid, his mortgage of certain real and personal estate, to secure the estate of Price harmless against said debts, and further as a security for the payment of \$2,500 due by Wimpee to said Price. In pursuance of said agreement, Wimpee executed the mortgage, dated 25th March 1853. That afterwards the Sheriff of Floyd county, under and by virtue of an execution at the suit of Luther Roll, against the surviving partner, Wimpee, which execution was younger than the mortgage, levied upon the mortgaged property and advertised the same for sale. At the sale, the mortgage was made known, and that it was to secure an amount much greater than the value of the property levied on. These facts were stated by one of the administrators, Daniel R. Mitchell, who at the same time waived their lien upon the property, as mortgagees, and stated that they would claim the proceeds of the sale, and thus the purchaser would get a good title, discharged of the mortgage lien. That Wimpee was present and assented to this arrangement, and no one objected; that the property

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after deducting the expenses of sale, brought \$2,384 25, and that this fund is still in the hands of the Sheriff, who refuses to pay it over to complainants.

The bill further states, that Wimpee is squandering and misapplying the assets of the said firm, and not paying or discharging the debts thereof, and is insolvent. The bill prays for the appointment of a receiver to take charge of the assets of said firm, and to pay the debts; that the Sheriff be decreed to pay to complainants the amount in his hands received from the sale of the mortgaged property, and that he be enjoined from paying out the same, to any other persons.

After this bill was filed, Baker and Wilcox, judgment creditors of Wimpee, surviving partner, took out a rule against the Sheriff, to show cause why he should not out of the proceeds of said sale, pay their execution. Their judgment bore date 2d June, 1854, junior also to the mortgage. The Court, upon the return of the Sheriff, refused to make the rule absolute, and that decision was affirmed by the Supreme Court, upon writ of error. See *Baker & Wilcox vs. Wimpee*, 22 Ga. R. 69.

Afterwards, Luther Roll, and Baker & Wilcox, commenced the bill in equity, and the cause came on for trial at February Term, 1859.

Charles Price, one of the administrators, and co-complainants in the bill, having died, the suit proceeded in the name of Mitchell, the surviving administrator.

At the trial, complainant after reading the bill and answers, offered and read in evidence the mortgage and note described therein; and also, a *fi. fa.* in favor of Black & Cobb against William Wimpee, surviving partner, for the sum of \$391 10, besides interest and cost, issued upon a judgment, dated 20th March, 1858, and closed.

Counsel for defendants, Black & Cobb, Baker, Wilcox & Co., and Luther Roll, then offered in evidence, the original notes by Wimpee & Price due to them, and the judgments

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obtained thereon. All of which, the Court rejected, holding and deciding, that the defendants could not come in and set up their claims to the money in the hands of the Sheriff, nor establish them against the estate of William T. Price, deceased, in that collateral way: And further holding, that the mortgage lien of complainant could not be defeated by the creditors of Wimpee.

To which ruling and decision counsel for defendants excepted.

PRINTUP and ALEXANDER, for plaintiff in error.

By the Court.—LUMPKIN J.'delivering the opinion.

The object of this bill was two-fold; first, to foreclose the mortgage given by Wimpee to the administrators of Price; and to enforce their lien upon the fund in the hands of the Sheriff, from the sale of the mortgaged property, in accordance with the agreement between the parties, at the time the property was sold; and, secondly, to have a receiver appointed to take charge of the partnership effects of the former firm of Wimpee & Price. Wimpee was the real defendant in the bill, and the partnership creditors were called in, not to litigate their claim upon the fund, or to obtain decrees against the estate of Price; but in order that they might be bound, by the decree against the fund, and against Wimpee, the surviving copartner. No decree was prayed for against the creditors. And in this aspect of the proceedings, we see no error in the ruling of the Court.

Did it appear that the estate of Price was insolvent, then perhaps, there would be equity in allowing these creditors to be heard. And in such case, the funds might be withheld from the hands of the representatives of Price, and applied directly to the demands of the creditors of the concern. But not only is there, the absence of any allegation to that effect; but we infer from the argument, that in point of fact, the

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contrary is true; that the estate is abundantly good for all its liabilities.

It seems too, that this fund was raised from the individual property of Wimpee. And the individual debt of \$2,500, due by Wimpee to the estate of Price, and which is secured by the mortgage, would be more than enough to cover the whole amount of the money collected, and would be entitled to priority over the copartnership debts. But in the end, this will make no difference, as the estate of Price is bound for the whole, and I suggest it merely as a ground, why it would be unreasonable to permit the firm creditors to intercept this cash, and divert it from the due course of administration.

By an examination of the mortgage, it will be seen, that contrary to what was assumed in the argument, these partnership debts are not provided for. The mortgage was given for the double purpose of securing the estate of Price, in the individual claim held on Wimpee, and to which I have already alluded, and to indemnify the estate against loss in having the partnership debts to pay; and for no other purpose.

We see no sufficient reason therefore, why this fund should be withheld from the mortgagees. Nor can we account why it is, the partnership creditors should be fighting over this money, at an expense and delay, and at most, insufficient to satisfy their debts, instead of pursuing the estate directly and getting their money.

Judgment affirmed.

EMILY D. WORD, plaintiff in error, vs. JAMES WORD, defendant in error.

In a libel for divorce, founded on desertion, evidence going to show, that the desertion was not "willful," or, that the plaintiff was consenting thereto, is admissible for the defendant.

Divorce, in Coweta Superior Court. Tried before Judge HAMMOND, March Term, 1859.

This was a libel for divorce *a vinculo matrimonii* by James Word against Emily D. Word, his wife, on the ground of willful and continued desertion, on her part, for three years.

On the trial plaintiff proved the marriage, which took place in December, 1849; that several months after the marriage his wife left his house, and went to and resided with her mother, and that she had been living with her mother for more than three years before the commencement of this suit. Here plaintiff closed.

Defendant proved by *John H. Newell*, a witness introduced by her, that the next day after she came back to her mother's, plaintiff came there and asked for her, saying that he wished to see her; witness told him that he could not see her, that Mrs. Word had requested him to say this to him (Word) in case he should call to see her. Witness at this time, charged plaintiff with treating his wife worse than he would have treated a dog, and he did not deny it. Mrs. Word was witness's sister; her general health was very bad. Word once agreed that she might come and stay with her mother while sick, and in a day or two took her home, when she was hardly able to travel. The night before defendant came back to her mother's, her negroes came there and remained at her mother's; her mother sent a negro woman to wait on her, and plaintiff put her in the field and left his wife, Mrs. Word, to do the cooking and washing, when her health was such that she was not able to do such work.

Defendant, then offered to read the depositions of *Mrs.*

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Sarah P. Wynne, taken by commission, to the effect "that in a conversation with plaintiff, in the summer of the year in which the parties separated, he said in an angry manner that he never intended that his wife should live with him again if she was the last woman in the world; that he had looked at her many times, and thought that it was well for her that she was so afflicted, and looked so pitiful, or he would have given her the hickory. Plaintiff became angry when the subject was first named, and continued so during the whole conversation. She told Mrs. Word of this conversation in the fall of the same year."

To *Cross Interrogatories*, she answered, "That she had had conversations with Mrs. Word, who stated to her, that she could not live with plaintiff that he treated her so unkindly in her afflictions; that she never heard Mr. Word say that her husband had not mistreated, but heard her often say that he was unkind to her, and she could not live with him."

The Court rejected these depositions, and counsel for defendant excepted.

Defendant then proposed to prove by the depositions of *Rebecca H. Glass*, that in the summer of the next year after Word and his wife separated, in a conversation with plaintiff, respecting his wife, she, the witness, told him that she thought he ought to see his wife and make friends, and try to live together again, and he replied in an angry manner, that he never wanted witness, or any person, to name that subject to him again, for he could neither be hired or persuaded to live with her again, and if she were to live with him again, he would not treat her as well as he had done. Plaintiff appeared very angry. Witness informed Mrs. Word of this conversation.

The Court rejected the evidence, and defendant excepted.

The jury found for the plaintiff, and rendered a verdict for a total divorce, but were silent on the subject of the cost. The counsel for defendant insisted that she was not liable

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for cost, and that judgment could not be entered up against her for the same—the verdict being silent on the subject, and she being a *feme covert*. The Court held otherwise, and ordered judgment to be entered up against defendant for the costs. To which decision defendant excepted.

ROBT. W. SIMMS, for plaintiff in error.

BUCHANAN, *contra*.

By the Court.—BENNING J. delivering the opinion.

Did the Court err in rejecting the testimony of Mrs. Wynn and that of Mrs. Glass? We think so.

The plaintiff had to make out a case of “willful and continued desertion” of him, by the defendant, “for the term of three years.” *Cobb’s Dig.* 226. The testimony of these two ladies, was such, that it might have satisfied the jury, that the defendant’s desertion of the plaintiff, was not “willful;” at least was not willful, for the time after the first, or second, year of the desertion, but was compulsory—was owing to the plaintiff’s opposition to her staying with him, or to her returning to him.

If he “was consenting” to the desertion, the desertion was not a ground for a divorce. *Cobb’s Dig.* 226. And the jury might have inferred from this evidence, if he had been before them, that he was consenting to the desertion—at least for the time subsequent to the first year or two of the desertion.

The testimony, then, ought we think to have been admitted.

As to the question of costs. This is not governed by the costs Act of 1842. That Act was amendatory of the costs Act of 1834, which was amendatory of the costs Act of 1792. This Act of 1792, was anterior in date, to the *first* divorce Act. Therefore, it could not be, that it gave costs in

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divorce cases brought under the Act; it must have been that it gave costs only in other than divorce cases. The two Acts amending it, do not add to the cases in which it gives costs, they confine themselves to the cases contained in the original Act. Therefore, it cannot be, that these two amending Acts regulate costs in divorce cases—or, in any way, apply to divorce cases.

The question of costs in divorce cases, stands, then, subject to be decided by the common law. And the common law puts alimony, fees to the wife's counsel, and costs all on the same footing, and makes the question who is to pay them, depend on the ability to pay them, of the parties respectively. As, however, marriage bestows the wife's property on the husband, in the absence of a marriage contract, the presumption, *prima facie* is, that the husband is the only party able to pay them; and, consequently, the husband is *prima facie*, liable to pay them. This he may rebut by showing that the wife is able to pay them.

In the present case, the evidence as to the ability of the parties respectively, if there was any such evidence, is not in the record, and therefore we cannot tell whether the Court did or did not decide the question of costs, according to the principles above stated, as those governing the question. The question however will be opened, as we have to grant a new trial, on the other point; and its final decision can be regulated by those principles.

We therefore do not decide the question about the costs, but merely say, what we do, on the question, to let it be known which way we incline.

New trial granted.

Bowie vs. Maddox & Goldsmith.

J. S. & L. BOWIE & Co., plaintiffs in error, vs. MADDOX & GOLDSMITH, defendants in error.

[1.] Gestures or exclamations or bearing, which are used as voluntary vehicles of thought, are an *acted language*, which is no more admissible in evidence in a man's favor, than his spoken words to the same effect would be.

[2.] It is error to charge the jury that circumstances can not outweigh positive testimony.

[3.] Persons who, by their acts, hold themselves out as members of a firm, when they actually are not such members, are liable as such, only to those persons who have acted on the faith of the truth of the appearance.

Complaint, in Chattooga Superior Court. Tried before Judge CROOK, March Term, 1859.

J. S. & L. Bowie & Co., of Charleston, South Carolina, brought suit against George B. T. Maddox, Josiah E. Maddox, and Andrew J. Goldsmith, partners in trade under the name and firm of Maddox & Goldsmith, on a promissory note for \$735 99, dated 15th October, 1857, and payable six months after date, signed "Maddox & Goldsmith."

George B. T. Maddox pleaded the general issue; and further, that he was not a partner of said firm of Maddox & Goldsmith at the time said note was given, and did not sign the same, nor authorize any one to do so for him.

During the progress of the trial, the defendant, George B. T. Maddox, amongst other things, offered to prove by witness, *Samuel Hawkins*, what his conduct was, and how he looked and demeaned himself, when informed by the witness that it was understood in Charleston that he was one of the firm of Maddox & Goldsmith.

To this testimony plaintiff objected, upon the ground, that the defendant could not thus manufacture evidence for himself. The Court overruled the objection and admitted the testimony, and plaintiff excepted.

After the testimony on both sides was closed, the Court charged the jury, as requested by counsel for defendant, that while the acts or declarations of defendant are compe-

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tent evidence to show that he was a partner in the firm, yet such circumstances will not, and cannot outweigh positive proof that he was not a partner, unless it appears by the proof that he held himself out to the public as a partner to give the firm credit."

The Court further charged, at the request of counsel for defendant, "that if they believed from the evidence, that Dr. G. B. T. Maddox sold goods in Summerville, Georgia, in the early part of 1857, down to 20th September, 1857, on his own account, without any partner, and in September sold out to Maddox & Goldsmith, who carried on the business until February, 1858, when Harlow bought out one partner, and afterwards the other; then defendant was not a member of the firm on 15th October, 1857, and the jury must find for the defendant, unless he did, or said something, which came to the knowledge of plaintiffs, to induce them to believe that he was a member of the firm at the time the note bears date.

To which charges plaintiff excepted.

The jury found for the plaintiffs as against Josiah E. Maddox and Andrew J. Goldsmith, but for the defendant G. B. T. Maddox.

Whereupon, counsel for plaintiff moved for a new trial, on the ground that the Court erred in the rulings and charges above stated, and excepted to.

The Court overruled the motion for a new trial, and plaintiff's excepted, and assigned as error said refusal.

DABNEY, for plaintiffs in error.

SHROPSHIRE, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We think the Court erred in admitting the testimony that Dr. Maddox manifested surprise on being informed, that in Charleston he was regarded as a member of this

firm. This was used as evidence that he was *not* a member. What more verity is there in a gesture or exclamation of surprise, than in plain words expressing the same emotion? Yet, his words to that effect would be confessedly inadmissible. To admit either the one or the other, would open a wide door for the introduction of manufactured evidence. There are a great many cases where the conduct of a person may be introduced as evidence for himself, but it is sufficient to remark that they are not cases, as in this instance, where gestures or exclamations, or even an "eloquent silence," are used as voluntary vehicles of thought. It would be exceedingly difficult to distinguish this from the case of spoken language, it is *acted* language—the one being quite as voluntary as the other.

[2.] We think the Court erred also, in charging the jury that circumstances could not outweigh direct testimony. Direct or positive testimony might come from a very unreliable person, or coming from a source of great respectability might yet break down under the weight of its own absurdity. It is impossible, therefore, to fix any uniform value upon direct or positive testimony as such. It is equally impossible to fix a uniform value upon circumstantial evidence as such. In many cases the one justly outweighs the other, while in many others the preponderance is precisely reversed. But strictly speaking, the evidence on both sides of this case was only circumstantial. The testimony that Dr. Maddox sold out, for instance, is only a circumstance raising an improbability that he was again immediately connected with the firm. No witness could know that he was *not* a member of the firm, except the members of the firm themselves. All other people are necessarily left only to infer it, if they get to that conclusion at all.

[3.] We think the Court was right in holding, that persons who are mere apparent partners as distinguished from actual partners, are responsible as such, only to those who have acted on the faith that the appearance was according

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to the reality. The whole foundation of holding such persons liable, is good faith. There can be no breach of faith where no faith has been refused.

Judgment reversed.

BENJ. BARFIELD, administrator, *de bonis non*, of **WINIFRED BARFIELD**, deceased, plaintiff in error, vs. **WILLIAM V. KING**, and others, defendants in error.

To a bill filed by an administrator to recover assets, the defendants set up the statute of limitations. The complainant insisted, that the defendants held by fraud; the defendants met that reply, by insisting, that the heirs had notice of the fraud, for the statutory period, before the suit. The Court charged, that if the heirs had such notice, the administrator was barred.

Held, That, as there might have been debts to be paid, by the administrator, and, as, the heirs might have been persons laboring under disabilities to sue, the charge was erroneous.

In Equity, from Spalding County. Tried before Judge **BULL**, at May Term, 1859.

This was a bill filed by Benjamin Barfield, administrator *de bonis non*, of Winifred Barfield, deceased, against William V. King, Milly Barfield and Sarah Barfield.

The bill states, in substance, that said Winifred Barfield, in her lifetime, drew a lot of land in originally Muscogee, now Harris county; and about 1829, she agreed to sell the same to one Noel Matthews, and sent her son, Samuel Barfield, to consummate said sale, and that he received for said land, a negro woman Sophia, and her child Sawney, and the sum of two hundred dollars in money. That at that time, the said Samuel and his brother, John Barfield, and his sisters, the said Milly and Sarah, all lived with their mother, the

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said Winifred, and said negroes were brought by Samuel to his mother's, where they remained until her death, about the year 1830.

The bill further charges, that said Samuel fraudulently took the bill of sale for said negroes to himself and in his name, and which he concealed from his mother during her life; that she was illiterate, unable to read or write, but always claimed the negroes, and had the possession and control of them as long as she lived, and her right and title was fully recognized and admitted by said Samuel.

The bill further states, that after the death of said Winifred, one Asa Sessions, her son-in-law, became her administrator, but failed to claim or administer said negroes as part of her estate, but allowed said Samuel to take and hold the same as his own. And the bill charges, that there was, in the opinion of complainant, a fraudulent and corrupt understanding and collusion between said Asa and said Samuel in reference to said negroes. That said Asa closed up said administration in a very short time, and obtained letters of dismissal therefrom, and soon thereafter became insolvent; and since his death, his children have received considerable amounts of money or other things of value from said Samuel.

The bill further charges, that after the death of said Winifred, the said Samuel claimed and held said negroes under said fraudulent bill of sale, and that the defendants, Milly and Sarah Barfield, were cognizant of said fraudulent claim and concealment.

The bill further states, that Samuel Barfield died in the year 1852 or 1853, and said negroes and their increase came into the possession of the defendants, William V. King, Milly Barfield and Sarah Barfield, who have held the same ever since; that said negroes and their increase now number about fifteen. That defendant, King, was appointed the executor of said Samuel, who left a will devising and bequeathing all his estate to said Milly and Sarah, his single sisters.

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The bill further states, that in 1853, complainant commenced his action of trover against the defendants, for the recovery of said negroes, to which action defendants pleaded the statute of limitations, and complainant avers that he is unable at law to overcome said plea, and can sustain and establish his claim only in and by the aid of a Court of Equity, by reason of the fraudulent concealment aforesaid, and the minority of many of the parties, beneficially interested at the time of Winifred Barfield's death, &c. ; and that neither complainant, nor those represented by him as administrator aforesaid, had any notice or knowledge of the title of said Winifred, in and to said negroes, or of the fraudulent practices, acts and concealments aforesaid, until a short time before the commencement of said action of trover.

The prayer of the bill is, that defendants be decreed to deliver up said slaves, and to account for their hire, that the same may be administered as the estate of said Winifred, and distributed according to law.

Defendants answered the bill, denying all its material allegations, and further relied upon the statute of limitations.

The bill was subsequently amended, alleging that in the year 1853, complainant and one Nathaniel H. King filed their bill against defendants, concerning said negroes, and prayed for a writ of *ne exeat*, which bill was sanctioned, and a *ne exeat* issued. Afterwards, a motion was made to discharge said writ, and upon the hearing thereof, at chambers, before Judge STARR, defendant, William V. King, offered in evidence a certain forged deed, purporting to have been executed by Winifred Barfield to Samuel Barfield, for the lot of land drawn by her in Muscogee county, bearing date 7th January, 1828, and witnessed by Uriah Askew and Joseph Boggs; that said deed was afterwards examined and inspected by his counsel and then delivered to defendant, King, who promised to record the same, which he has never done, and which he has now in his custody or control, and complainant prays he may answer fully concerning the same

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During the trial, complainant proposed to prove by *David H. Martin* and *Gilbert J. Green*, his counsel in the cause, that the original writ of *ne exeat*, mentioned in the bill, was lost, and that the copy offered in evidence was a true copy of said original; and that the answers of William V. King, with the exhibits thereto attached to said bill, were lost, and no copy thereof was in existence. And also, to prove that at the trial before Judge STARK, King, the defendant, produced and exhibited the deed mentioned in the amendment to complainants' bill, and which deed said defendant, in his answer to the amendment, and in his answer to the notice to produce the same to be used in the trial, denied having produced at the hearing at chambers before Judge STARK. Defendant objected to the competency of these gentlemen as witnesses, upon the ground that they came to the knowledge of the facts proposed to be proven, by reason of and pending their relation as attorneys; and therefore, excluded by Act of 1850. The Court sustained the objection and excluded the witnesses, and complainant excepted.

At the conclusion of the testimony, the Court charged the jury, amongst other things, that if the heirs of Winifred Barfield had notice of the facts and circumstances which are relied on to show fraud, then the statute of limitations commenced to run against them from the time of such notice. That it is a general principle that, in cases of fraud, the statute does not commence running until the discovery of fraud. If the distributees of Winifred Barfield were defrauded by Samuel Barfield, and the circumstances constituting the fraud were concealed from them, or not discovered by them, then the statute would not run against them until the discovery; and in order to determine this question, it was proper to consider the circumstances as disclosed by the evidence; the age of the parties; their remoteness from or proximity to the scene of the transactions; the nature of the transactions—that if they, the heirs, or Sessions, the administrator of Mrs. Barfield, were acquainted with the facts and circumstances,

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and Sessions suffered the statutory period to elapse without bringing suit, then he and his successors in administration are barred, &c. To which charge complainant excepted.

The jury found and decreed for the defendants. Whereupon complainant moved for a new trial on the following grounds:

1st. Because the verdict was contrary to the evidence and the weight of evidence.

2d. Because the Court erred in rejecting the testimony of Martin and Green, counsel for complainant.

3d. Because the Court erred in its charge to the jury.

The Court overruled the motion for a new trial, and complainant excepted.

MARTIN; GREEN; and GIBSON, for plaintiff in error.

ALFORD; DOYAL; and PEEPLES & CABANISS, *contra*.

By the Court.—BENNING J. delivering the opinion.

All the questions in the case, are included in the motion for a new trial. We may, therefore, confine ourselves to that motion.

The Court overruled that motion; was the Court right in doing so?

The grounds of the motion were three; of which it is not necessary to consider the first.

The second was, the rejection "of the testimony of Martin and Green, counsel for complainant."

We think it clear, that the facts sought to be proved by these gentlemen, came to their knowledge, during the existence of the relationship of client and attorney, between them and the complainants in the *ne exeat* suit, and, by reason of that relationship. And the statute says, that "it shall not be lawful for any attorney at law, or in equity," "to give testimony" of such facts. *Cobb Dig.* 280.

The Court, then, was, we think, right in excluding these two gentlemen as witnesses.

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The third ground of the motion, was the charge of the Court.

A part only of the charge was objected to, in this Court; the part which says, "that if the *heirs* of Winifred Barfield, had notice of the facts of the fraud, the statute of limitations, commenced running against them, from the time of such notice.

It is probable, that the impression, which this part of the charge made on the jury, and which it was the Court's intention, that it should make on them, was, that notice of the fraud, to the heirs, was notice of it, to the administrator, and therefore, that, if there had been four years notice of the fraud to them, the suit, although not a suit by them, but by the administrator, was barred.

Was this a proper impression to be made on the jury? We think not. It may be that there were debts to pay. If there were, the administrator was entitled to have the assets, to pay the debts, even although he might not be entitled to them, to distribute to the next of kin. The negligence of the next of kin, might affect their own rights, but it could not affect the rights of the creditors. Indeed, if there were creditors, would mere inaction in the next of kin, be at all prejudicial to them—they having the right to no part of the assets, except such as might remain, after the payment of the debts? If, then, there were debts, notice of the fraud to the next of kin, was not sufficient to bar the right of the administrator. And it is not alleged, or proved, that there were no debts.

For this reason, then, this part of the charge, was, we think, erroneous.

It was amiss, we think, for another reason. It does not appear, who the heirs were; it is not alleged in the answer, or proved by the evidence, who they were. It may be, therefore, that they, or some of them, were persons laboring under some of the disabilities to sue, mentioned in the statute of limitations. If they were, those statutes would not begin to run

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against them, even though they had notice of the fraud, until the removal of such disabilities. Yet the charge is absolute and general, and therefore, is a charge as much covering the case of heirs laboring under disabilities, as, the case of heirs not laboring under disabilities.

For these reasons, then we think, that this, the third ground of the motion, was good.

Judgment reversed.

A. H. FOSTER, and others, plaintiffs in error, vs. LEEPER & MENAFEE, defendants in error.

- [1.] A party on the record, who at the trial, has no interest in the event of the suit may be examined as a witness. *The Central Rail Road & Banking Co. vs. Hines, Perkins & Co.* 19 Ga. Rep. 203, affirmed.
- [2.] The copy of a letter purporting to have been written by defendants to plaintiffs, is inadmissible, there being no proof that it was ever received or even sent.
- [3.] Letters written by defendant acknowledging the terms of the contract sufficient to take the case out of the statute of frauds.
- [4.] If plaintiff calls two days before the time, when bacon is to be delivered, at the request of defendant, and is told that it will not be delivered because it has been sold to others, no further demand is necessary.
- [5.] If the evidence fully supports the verdict, it will not be set aside on the ground of excessiveness.

Assumpsit, in Catoosa Superior Court. Tried before Judge CROOK, at May Term, 1859.

This was an action by Michael Dickson, Thomas A. Buford, and Alexander H. Foster, against John Leeper and E. P. Menafee, partners under the name and style of Leeper & Menafee, for the recovery of damages, alleged in

their declaration to have been sustained by reason of the failure and refusal of defendants to deliver to plaintiffs at Murfreesboro, in the State of Tennessee, sixty thousand pounds of bacon, as they had agreed and undertaken to do. The declaration further alleged that said defendants agreed and contracted to deliver said bacon at the place aforesaid, by the 20th March, 1857, at and for the price of nine cents per pound, and that plaintiffs, on that day, demanded said bacon, and were ready to pay for the same, but defendants failed and refused to deliver the same, and that said bacon was worth at that time 15 cents per pound, and plaintiff's thereby were damaged the sum of \$3,600.

The case was submitted upon the evidence and charge of the Court. The jury found for the plaintiffs six hundred dollars. Defendants moved for a new trial on the following grounds:

1st. Because the Court erred in permitting Alexander H. Foster, one of the parties plaintiffs, on the record, to be examined as a witness for the plaintiffs.

2d. Because the Court erred in excluding from the jury the copy letter from defendants to A. H. Foster, one of the plaintiffs dated 12th March, 1857, which was tendered in evidence by defendants.

3d. Because the verdict is contrary to the evidence, and strongly and decidedly against the weight of the evidence, and contrary to law.

4th. Because the verdict is against the charge of the Court in this, that the Court charged the jury, "that it was necessary for plaintiffs to prove that they were ready to comply with said contract on their part, by paying the money for the bacon, before they were entitled to recover." There being no evidence, as defendants insist, that plaintiffs were ready so to comply.

5th. Because the jury found contrary to the charge of the Court in this, that the Court charged, "that the plaintiffs were not entitled to recover (the amount being more than

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£10) unless they accepted part of the bacon, and actually received the same, or gave something as earnest to bind the bargain, or in part payment, or there was some note or memorandum in writing, signed by the parties to be charged, or by their agents thereunto lawfully authorized." Defendants insisting that there was no evidence of any such, acceptance, part payment, or note or memorandum in writing.

6th. Because the Court erred in refusing to charge, as requested in writing by the defendants' counsel, that if the jury believed that the bacon was to be delivered at Murfreesboro, on or after the 20th March, and plaintiffs never called for it on or after that date, then the defendants are not liable; that calling for the bacon on the 18th March would be no compliance with a contract to deliver on the 20th, or up to 1st April. In other words plaintiffs must show that they demanded or called for the bacon on the day it was, by the contract, to be delivered, and that they were ready to pay the money for it, and failing to prove this, they cannot recover. And in lieu of said charge thus requested the Court charged the jury, that if they believed that one of the plaintiffs called on defendants before the day for the delivery of the bacon—say on the 18th March, and defendants informed him that the bacon had been sold to other parties, then it was not necessary for plaintiffs to show that they again called on the 20th, the day the bacon was to have been delivered as per contract, provided they should think that a contract had been proved.

7th. Because the damages were excessive.

After argument, the Court set aside the verdict, and granted a new trial on the third, fourth and fifth grounds of the motion.

To which decision plaintiffs excepted.

DABNEY; McCONNELL; and AKIN, for plaintiffs in error.

WALKER; and HACKETT, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

[1.] Was Foster a competent witness for the plaintiffs? We hold that he was upon the authority of the *Central Railroad & Banking Co., vs. Hines, Perkins & Co.*, (19 Ga. Rep. 203,) with which we are satisfied.

[2.] Was the Court right in excluding as testimony from the jury, a copy of a letter, purporting to have been written by defendant to Foster, the 12th of March, 1857? We think so; for this reason, amongst others, that it did not appear that the original was ever received by him, or even that it was sent.

[3.] Does this case come within the statute of frauds? We think not. The letters of the defendant contain a sufficient acknowledgement of the contract.

[4.] The request asked of the Court was not law, even admitting that the bacon was to be delivered, and paid for, between the 20th of March and the 1st of April, 1857. If the plaintiff called on the 18th of March to get the bacon, in accordance with the wishes of the defendants, as communicated in their letter, and was informed by them that they could not comply with their contract, for that they had sold the bacon bought for him to others, that dispensed with any future or further demand or offer to comply with their contract by Foster, & Co.

[5.] Nor do we think the recovery excessive. Defendants proposed to sell Foster sides at 12½ or 13 cents, and that is the best proof of what bacon was worth at the time. And the clerk of defendants testifies that the difference between the price of sides and the hog round, was from 1 to 1½ cents. This will leave a margin sufficiently broad to cover the damages, and that too after deducting the expenses of furnishing casks and packing.

[6.] The evidence, we think, was ample to support the verdict. This is a plain case; the price of bacon rose, and the defendants considered it better to risk a recovery in

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damages rather than comply with their contract. The jury likely did right.

Judgment reversed.

**ROBERT L. RODDY AND WIFE, and others, plaintiffs in error,
vs. AARON J. Cox, defendant in error.**

A joint tenant cannot maintain trover against his co-tenant, except in a case where one has taken several possession to the exclusion of the other; and in such a case, the measure of his recovery is the value of his interest in the particular property, after allowing his co-tenant the value of his interest in all other property covered by the same joint title, and held by the plaintiff adversely to his co-tenant. In other words, a recovery in such a case, is a severance of the joint tenancy, and the defendant may refuse a severance as to the part in his adverse possession, unless the plaintiff submits to a severance of that part of the joint property which may be held by him in the like adverse possession.

In Equity, in Monroe Superior Court. Decision on demurrer, by Judge CABANISS, at chambers, 21st June, 1859.

The following judgment pronounced by Judge CABANISS, the presiding Judge, sustaining the demurrer, sets out all the facts necessary to a full understanding of the case, and the opinion of this Court, viz :

The bill in this case is filed by R. L. Roddy and wife, W. L. Lampkin and wife, R. N. Martin, and Andrew Dunn, and alleges that they are children, and heirs at law of Josee Dunn, deceased; that they are the only sisters and brother of David A. Dunn, of Pike county, Alabama, deceased, and claim to be heirs at law of said David A. Dunn, together with his widow; that said Josee Dunn, before his death, made and

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executed his last will and testament, in and by which he gave and bequeathed to his said son, David A. Dunn, certain negroes and property therein named, which he left in the possession of Stephen H. Martin, as trustee for his said son, and his heirs, and not to be subject to any of the debts of his said son, but that he should have the income thereof yearly; that said Stephen H. Martin took possession of said property and held the same in trust for said David A. Dunn, to pay him the income thereof yearly during his life, and to hold the remainder for his heirs; that said David A. Dunn never had any estate in said property, except the annual profits thereof; that said Stephen H. Martin held said property in trust as aforesaid for many years, until said David A. Dunn removed to the State of Alabama, when he delivered said property to a trustee appointed in said State, viz: Franklin A. Rutherford, who took charge of the same in terms of the original trust; that said David A., married Octavia Rutherford, in said State of Alabama, and afterwards died, leaving no child, but leaving his said wife Octavia, and his sisters and brother, the complainants in this bill, his heirs at law, and his estate is subject to distribution among them according to the laws of said State, his widow being entitled to one-fourth, and his next of kin to the remaining three-fourths.

It is further alleged, that said Franklin A. Rutherford filed a bill in the Chancery Court of Pike county, Alabama, and had the estate of said David A. Dunn decreed insolvent, and that said property was not subject to his debts, but that he had only a life interest in the same, and thereupon the said property was turned over to said Rutherford for distribution among the heirs at law of said David A., and the complainants charge that said property is subject to distribution between them and the widow of the said David A. Dunn.

It is alleged, that the widow of said David A., has intermarried with one Aaron J. Cox, to whom said Franklin Rutherford has turned over all of said property and negroes, ex-

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cept one, and that he has since moved to some distant State, and that he and said Rutherford both reside beyond the jurisdiction of this State.

It is further alleged, that one of said negroes, by the name of *Troup*, ran away from said Cox, and came to the house of Robert L. Roddy, one of the complainants, in whose possession he has since been with the approval of the other complainants.

It is further charged, that said Aaron J. Cox has commenced his action of trover in Monroe Superior Court against said Robert L. Roddy for said negro *Troup*. And complainants allege that they are jointly interested with said Aaron J. Cox, in said negro, and are entitled to have said negro partitioned among them, share and share alike, and for this purpose they pray that he may be sold, and that the proceeds of the sale and hire of said negro be divided amongst them, if it shall be found that said Cox has not received more than his share of the estate of said David A. Dunn, deceased, but they charge that he has received, and has now in his possession some where in the western States, all the remainder of said estate, amounting to greatly more than the value of said negro *Troup*.

They pray that said Cox be enjoined from further prosecuting said action of trover, and that said Cox and Rutherford may be decreed to account to and with the complainants for the amount and value of the negroes, which are in the possession of said Cox, together with their hire, deducting from the same his share, acquired by virtue of his intermarriage with the widow of said David A. Dunn, and his share of the boy *Troup*.

To this bill, defendants have demurred, upon the following grounds, viz:

1st. For want of equity in the bill.

2d. That the complainants have no interest in the property sued for, and no right to recover it, but that it passed under the will of Josee Dunn, deceased, to Octavia Dunn, widow

of said David A. Dunn, as his sole heir at law, according to the laws of this State, where said will was made; and upon her intermarriage with Aaron J. Cox, the negro in dispute vested absolutely in him by virtue of his marital rights.

3d. That the bill is multifarious.

The first two grounds of demurrer may be considered together, as they are virtually the same, for if the second is true, the first is necessarily so; if the complainants have no interest in the negro sued for, it follows as a necessary consequence, that there is no equity in the bill to entitle them to relief.

The question made by the demurrer is, who are the heirs at law of David A. Dunn, deceased, in the sense of the term "heirs," as used by Josee Dunn in his last will and testament? Are they only to be considered "heirs" who are such according to the laws of Georgia, where the will was made, or are they to be held to be his heirs, who are such according to the laws of Alabama, where David A. Dunn was domiciled at the time of his death? According to the allegations in the bill, the last will and testament of Josee Dunn was made and executed in Georgia, where the testator at that time, and at his death, was domiciled. By that will, he bequeathed the negro in controversy together with other property, to his son David A. Dunn, to be held in trust by Stephen H. Martin for said David A. Dunn and his heirs, not to be subject to any of the debts of his said son, but he was to have the annual profits of the same. David A. Dunn, after the death of his father, moved to Alabama, and the negro was removed to the same State, and went into the possession of the trustee appointed in that State. David A. Dunn there intermarried with Octavia Rutherford, and after the lapse of some years, died, leaving no issue.

According to the laws of the State of Alabama, the heirs at law of a man, who dies without issue, leaving a widow, are his widow and next of kin, the next of kin being broth-

ers and sisters, if any; the widow is entitled to one-fourth, and his next of kin to three-fourths of his estate.

Admitting (and that is the question made by the demurrer) that only a life estate in the negro sued for was bequeathed to David A. Dunn with remainder to his heirs, the complainants insist that, according to the law of the domicil of said David A. Dunn, at the time of his death, they are heirs at law of said David A., and are entitled to their respective shares of his estate, and, being his heirs, are, in that right, entitled to their shares of the negro Troup.

The defendants reply, that the property passes under the will of Josee Dunn, deceased, and his will must be construed according to the law of *his* domicil, and according to that law, the widow of David A. Dunn, who died without issue, is his sole heir at law, and is entitled to the property bequeathed to him and his heirs. They insist that the word "heirs," must be construed according to the law of the domicil of Josee Dunn, and not according to the law of the domicil of David A. Dunn.

In consideration of this question, it is essential to bear in mind, that the property in dispute descends, not *as the property* of David A. Dunn to his heirs at law, but as the property of Josee Dunn, first to his son David A., during his life, and after his death to his heirs.

If it is to be distributed as the property of the estate of David A. Dunn among his heirs, it would unquestionably go to, and be distributed among those, who are his heirs at law according to the law of his domicil at the time of his death. But it was his property only during his life; at his death all his right, title and interest in it, and all dominion and control over it, ceased forever. According to the facts admitted by the demurrer, he had no right to direct the disposition of it by will, nor did it derive any inheritable quality from him under the law of his domicil; its inheritable quality comes from another source; from Josee Dunn, and the disposition made of the property in his will. After the

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death of David A. Dunn, it descends not from his estate to his heirs, but from the estate of Josee Dunn to the heirs of David A. Dunn. Who, then, are the heirs of David A. Dunn, in the sense and meaning of that term, as used by Josee Dunn in his will?

The rule of construction in such cases, long and universally recognized by the Courts of all countries, where systems of enlightened jurisprudence prevail, must settle this question. The rule in regard to wills and testaments of personal property is thus laid down in *Story's Conflict of Laws*, Sec. 469, a:

"In such cases, where the will or testament is made in the place of the domicil of the testator, the general rule of the common law is, that it is to be construed according to the law of the place of his domicil in which it is made. A will, therefore, made of personal estate in England, is to be construed according to the meaning of the terms used by the law of England; and this rule equally applies, whether the judicial enquiry as to its meaning and interpretation arises in England or in any other country."

"A will must be interpreted according to the law of the country where it is made, and where the party making the will has his domicil."

Lord Ch. Lyndhurst, in Trotter vs. Trotter, 4 Bligh's Reports, N. S. 502.

"The same rule will apply to the ascertainment of the persons who are to take under a will or testament, when it is made by words designating a particular class, or description of persons. Who are the proper persons entitled to take under the *designatio personarum* is a point to be ascertained by the law of the place where the will is made, and the testator is domiciled. Thus, for example, if a testator should bequeath his personal estate to his "heir at law," who is the person entitled to take under that description, will depend upon the law of his domicil. If domiciled in England, it will be the eldest son; if domiciled in most of

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the States of America, it will be all his children. So if a person domiciled in Holland, should bequeath his property to the "male children" of certain persons, and the question should arise, as well it might, whether by "male children" be meant male descendants, that is, descendants claiming through males only, the question would be decided by the interpretation put upon those words by the law of Holland." *Story's Con. of Laws, Sec. 479, c.*

The same rule is laid down by the Supreme Court of the United States in the case of *Harrison et al. vs. Nixon, & Peters*, 483.

In that case, the testator, Matthias Aspden, willed that his estate, real and personal, should go to the party, who would be his lawful heir, in case there might arise any doubts on that head.

The bill was filed in the Circuit Court of the eastern district of Pennsylvania, by *Samuel Packer vs. Henry Nixon*, executor of the last will and testament of Matthias Aspden, in which he alleged, "that on the 6th day of December, in the year of our Lord, 1791, one Matthias Aspden, Esquire, a citizen of the State of Pennsylvania, made and executed his last will and testament, bearing date the same day and year, wherein and whereby he gave and bequeathed all his estates, real and personal, to his heir at law." The complainant alleged himself to be the heir at law of the deceased, and prayed an account and distribution of his personal estate.

The defendant answered, among other things, that the property of the testator was claimed by John Aspden, of London, as entitled thereto, under the devise of said testator, as his heir at law.

Pending the suit, petitions were filed by George Harrison and others, who claimed to have distribution among them, of the estate of the testator, as the party contemplated by the will, and prayed that the Court would direct inquiries to be made as to their respective claims. The Court ordered that

it be referred to a Master to examine, and state the next of kin to the testator

The Master reported that John Aspden was "heir at common law," and the Circuit Court decreed that the executor should account to, and pay over to John Aspden, the heir at law of the said Matthias Aspden, deceased, the personal estate in his hands, after paying debts, &c. From this decree George Harrison and others took an appeal to the Supreme Court.

The domicile of the testator was not distinctly averred in the bill, and the Supreme Court Held that an averment of the testator's domicile was indispensable, and that a true interpretation could not be made until the country by whose laws the will was to be interpreted was first ascertained; and the case was remanded to the circuit Court for the purpose of having suitable amendments made in this particular.

Mr. Justice Story, who delivered the opinion of the Court, said:

"The present is the case of a will: and so far, at least, as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will. And the Court are called upon to give a construction to the terms of the will; and in an especial manner to ascertain, who is meant by the words heir at law, in the leading bequest in the will. The language of wills is not of universal interpretation, having the same precise import in all countries, and under all circumstances. They are supposed to speak the sense of the testator, according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language, which repels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicile governs in the distribution thereof, unless it is manifest, that the testator had the laws of some other country in view.

"No one can doubt, if a testator born and domiciled in

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England during his whole life should, by his will give his personal estate to his heir at law, that the *descriptio persone* would have reference to, and be governed by the import of the term in the sense of the laws of England. The import of them might be very different, if the testator were born and domiciled in France, in Louisiana, Pennsylvania, or in Massachusetts. In short, a will of personalty speaks according to the laws of the testator's domicile, where there are no other circumstances to control their application: and to raise the question, what the testator means, we must first ascertain what was his domicile, and whether he had reference to the laws of that place, or to the laws of any foreign country.

"The opinion of the Court distinctly and clearly recognizes the doctrine that the import of the words "heir at law, is to be ascertained by reference to the law of the testator's domicile; and he, and no one else, is heir at law, whom that law makes such. And the case was remanded to have an averment of the testator's domicile at the execution of the will, and at his death, inserted, so that the country by whose laws the will was to be interpreted might be ascertained. When that was done, there was no doubt as to the application of the rule."

The same rule is recognized by Chancellor Kent, in *Holmes vs. Remsen*, 4 *Johnson's Ch. Rep.* 460.

"The succession to and distribution of personal property is regulated by the law of the owner's domicile, and not by the *lex loci rei sitæ*."

Sec. 481, *Story's Con. of Laws*, is quoted and relied on by counsel for complainants.

"The universal doctrine now recognized by the common law, although formerly much contested, is that the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death. It is of no consequence what is the country of the birth of the actual intestate, or of his former domicile, or what is the actual *situs* of the personal property at the time

of his death; it devolves upon those who are entitled to take it as heirs or distributees, according to the law of his actual domicil at the time of his death."

It has been already remarked, that the property in dispute does not descend as the property of David A. Dunn—if it did, the doctrine in the section above quoted would be applicable. It is not inherited from him, but passes under the will of Josee Dunn, after the termination of the life estate of David A. Dunn, to the heirs of David A. Dunn. Who those "heirs" are, and who answer that *descriptio personarum* must be ascertained by reference to the import of the term according to the laws of Georgia, the place of the testator's domicil at the making of the will, and at his death. When he used the word "heirs," the presumption is, he meant those who are heirs according to the laws of Georgia, and not those who are heirs according to the laws of Alabama—until this presumption is removed, it is conclusive—it may be removed by showing that at the time the will was executed, the testator had reference to the laws of Alabama, and not to those of Georgia, but this does not appear in the will itself, or otherwise. Construing, then, the word "heirs" according to the laws of Georgia, the widow of David A. Dunn, who died without issue, is his sole heir at law—and as such the property bequeathed by the will of Josee Dunn to his son David A., and after his death to his heirs, passed to her and her alone, and not to her and the next of kin of David A. Dunn, jointly, according to the laws of Alabama.

If the Court is correct in this construction of the word "heirs" in the will of Josee Dunn, the complainants have no interest in the negro sued for, and no right to recover.

This view being decisive of the case according to the question made by the demurrer, it is unnecessary to determine the other ground, further than to say, that in the opinion of the Court the bill is multifarious, but that defect

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can be cured by amendment, and the bill will not be dismissed on that ground.

The Court will not consider and decide the question, whether the property bequeathed by Josee Dunn in his will to his son David A. Dunn did not, according to the legal import and effect of the terms used, vest absolutely—that question not being raised by the demurrer, and being reserved for argument on the plea. If the judgment of the Court on the demurrer should be reversed, the Court will then hear and determine the other question at the proper time.

It is ordered and adjudged by the Court, that the demurrer be sustained, and that the bill be dismissed on the ground that the complainants have no interest in the negro sued for, and have no right to the relief they seek, the widow of David A. Dunn being his sole heir at law, and as such is entitled to the property bequeathed to him and his heirs in the will of Josee Dunn, deceased.

To which decision, counsel for complainants except.

PEEPLES & CABANISS; TRIPPE & STEVENS, for plaintiffs in error.

JOHN RUTHERFORD; and A. D. HAMMOND, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

We concur with the Court below, that there is no equity in this bill, but our view of the rights of the parties is very different from that expressed by Judge CABANISS. Whether the estate given by the will of Josee Dunn, to his son David, was a fee simple, or only life estate, with remainder to his heirs at law, and in the latter case whether the heirs at law are only the widow, or are the widow together with the rest of kin, are questions which were strenuously argued before us, but which both sides at last besought us *not* to decide, if a decision of them could be avoided.

We think such a decision not at all necessary to a disposition of the case, and will therefore refrain according to the wishes expressed to us, from giving our views upon these points indicated; but will content ourselves with stating the reasons why we think that, upon any one of the views suggested, this bill was unnecessary, and therefore without equity.

If the estate conveyed, was a life estate to David, with remainder to his heirs at law, and the widow is sole heir, then the bill fails for the reason assigned by Judge CABANISS, that is to say the complainants simply have no interest in the matter. But suppose the heirs at law to be the widow, together with the complainants, who are the next of kin. This was decidedly the favorite hypothesis of the complainants. If it be the true one what *need* have they for the bill?—they, who are defendants in the trover case, and Cox, who is plaintiff, are *joint tenants* of the negro. What need has one joint tenant for an injunction to restrain his co-tenant from recovering the property from him? His defence at law is good, and he needs no more. But it may be suggested that although, as a general rule, one joint tenant can not maintain trover against his co-tenant; yet he may do so when, as in this case, the tenant in possession sets up his own adverse claim to the whole, to the exclusion of his co-tenant. This also is true; but in such a case the recovery is founded on a *partition*. Neither joint tenant is entitled to recover from the other, under any circumstances, the entire property jointly owned, but only the value of his own interest in it. Such a case results in a *partition* of the *joint property*—the *whole* property which is held by the *same joint title*. They may, if they choose, remain joint tenants, but either has the right to a *severance*. This is a *severance* of the *whole*, and not of a *part*. Now the bill alleges in this case, that Cox, the plaintiff in trover, has in his possession, to the exclusion of his joint tenants, much more than his share of the whole joint property. If so, he

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is not entitled to recover his interest in the particular negro, Troup, whom Dr. Roddy happens to have in his possession. Cox cannot insist on a severance as to Troup, without allowing it as to all the rest. Upon the supposition that the property is to *remain joint*, one joint tenant cannot recover from another at all; his recovery must be based upon a severance, and then the *measure* of his recovery would be the value of his interest in the particular property sued for, after an apportionment of the *whole*. But an apportionment in this case defeats the right of recovery at all, and there was no need of an injunction. True, the bill does more than ask an injunction; it seeks a full apportionment, and it is contended that the bill ought to have been retained for this purpose. It cannot be retained for that purpose, because of the *want of jurisdiction* over Cox, who, as shown by the bill, resides out of the State, and was not caught in the State for service. This part of the bill rests upon the other, and of course falls with it. Without the injunction as a support for the jurisdiction, it becomes simply a suit in this State against a resident of some other State, who does not appear ever to have put his foot inside of the limits of Georgia. As it was strongly intimated in the argument that the rights of these parties would come before us again, upon the points which we do not decide, I will not pass from this part of the subject, without indicating a point on which we desire to have authority produced, if any exists; that point is, who are the heirs of David Dunn (in case David did not take a fee) meant by the will of Josee Dunn? We do not feel the least difficulty in holding that the will (Josee Dunn having died domiciled in this State) must be construed according to the laws of Georgia; but we cannot see that this necessarily leads to the conclusion that the widow is the only heir (there being no children). The question with this assumption then, becomes this; who are the heirs of David Dunn's personal property *according to the laws of Georgia, he having died domiciled in the State of Ala-*

bama? The *heir* is he on whom the law casts the inheritance. Different laws cast it on different persons, but still, he on whom it is cast, is the heir. Then on whom would the *laws of Georgia* cast the personal property (situate in Georgia) of a person dying *intestate, domiciled* in Alabama? The question is not, on whom the laws of Georgia would cast the personal property of David Dunn, *if* he had died domiciled in Georgia; that is a supposititious case. The case before us is, when he died domiciled in *Alabama*. This exhausts two out of the three possible cases; the other is that of a fee in David. In that case the property must pass through the hands of David's administrator or executor, for payment of debts first, and then for distribution according to law, or the will, if there be one. Of course the heirs at law could not maintain trover before this has been done, and there is no need of an injunction to restrain Cox in that view; but it is suggested that this has been done, and that the decree in Alabama is an *adjudication* that the property belongs for distribution to the heirs at law; that whatever estate may have been created by the will of Josee Dunn, it is now *res adjudicata*. This may be so to the extent of binding those creditors who were parties to decree, or it may be so without any qualification whatever; but then if so, it only amounts to this—that the property belongs to the heirs at law, (if more than one) as joint tenants. This latter case we have already shown, needs no aid from an injunction; so that in any of the three views taken of the interests of these parties, we are satisfied there was no use for an injunction, and no jurisdiction for an apportionment. The plaintiff in trover can *submit* to an apportionment if he chooses, but there is no power here to enforce it against him.

Judgment affirmed.

McCune vs. McMichael.

RUTH J. McCUNE, plaintiff in error, vs. **LEROY McMICHAEL**,
defendant in error.

One, who by acts or declarations, induces another to buy property, as the property of a third person, is thereby estopped from setting up title in themselves to said property; but to make such acts or declarations a bar, it should appear that they were known to the purchaser, and that he acted upon them, and not upon his own knowledge or judgment.

Trover, in Butts Superior Court. Tried before Judge
CABANISS, March Term, 1859.

This was an action of trover, by Ruth J. McCune, against Leroy McMichael, for the recovery of six negroes. The negroes were by the last will and testament of James A. McCune, bequeathed to plaintiff, who was his wife, for and during her life, remainder to his four children.

It appeared, that plaintiff about the year 18—, made a division of certain negroes which she held as tenant for life, between R. W. McCune and Leroy McMichael, her son and son-in-law, and remaindermen in and under said will, and delivered them to the parties. R. W. McCune took possession of the negroes thus allotted to him, and held them until his death, as did also McMichael. After the death of R. W. McCune, James H. Stark administered on his estate, and sold these negroes as part of his estate, and Leroy McMichael, the defendant, became the purchaser. This action was brought by Ruth J. McCune, the tenant for life, to recover said negroes from McMichael, she claiming and insisting that her life estate has not terminated, and that she is entitled to said slaves.

The important and material questions in the case and to which most of the testimony, which was voluminous, was directed, were, first, whether plaintiff had relinquished her life interest in and to said slaves, when she made the division aforesaid, and suffered them to go into the possession of of R. W. McCune, the remainderman, and thereby vested

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them absolutely in him, or whether she only loaned or let him and McMichael have them during her pleasure, and until she should call for them? 2d. Whether plaintiff assented to the sale of said negroes by the administrator of R. W. McCune, and if she was not estopped and concluded by such assent?

After the testimony was closed, and the Court charged the jury, counsel for plaintiff requested the Court to charge the jury, that in order to enable defendant to defeat a recovery, they must be satisfied that he did not himself have knowledge of the true state of the transaction between plaintiff and R. W. McCune, so as to enable him to act upon his own information and judgment; for if he had full knowledge of the matter, he was bound to act in accordance with the law of the case. And also that defendant was influenced to purchase the negroes by the admissions and acts of plaintiff. And further, that if they were satisfied that defendant in the purchase of said negroes did not act upon the acts or admissions of plaintiff, then, and in such case, it is the privilege and right of plaintiff to controvert and disprove the truth of any admission made by her to others; and if the evidence satisfied them that the admission was erroneous and untrue, they should find according to the truth, notwithstanding such admission.

Which request the Court refused to charge, but charged the jury that in order to estop or conclude a party by an act or admission, it must appear that such party understood the subject matter at the time; for if an admission be made, or an act done without fraud, then the whole matter is subject to the full investigation of the jury, who are to ascertain the *truth*, and find accordingly.

Plaintiff's counsel further requested the Court to charge the jury, that when property remains in the possession of a tenant for life, that is an assent to the entire legacy, and the property being in possession of Mrs. McCune, at the death of

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testator, by virtue of her office of executrix, and there remaining, necessarily put her in possession with her assent. Which the Court refused to charge.

The jury found for the defendant, and plaintiff moved for a new trial, on the grounds that the Court erred in refusing to charge as requested; that the Court erred in admitting in evidence the depositions of James H. Stark, the administrator of R. W. McCune, he being an interested witness, and because the verdict was contrary to law and the evidence.

BAILY; BEECH; and GIBSON, for plaintiff in error.

LYON & BOYTON; PEEPLES & CABANISS, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

We see no error in the record in this case, except the refusal of the Court to charge as requested; that if the defendant when he purchased, had knowledge of the plaintiff's title; Ruth J. McCune is not estopped from recovering the property, notwithstanding her declarations to Judge STARK and others, unless it was shown that McMichael had knowledge of these declarations, and acted upon them in buying the negroes at the administrator's sale. I state the substance or legal tenor of the request only.

Upon the next trial of this case, the first question to be found is, was the surrender of the life estate by Mrs. McCune to the remaindermen, absolute and unconditional? If so, there is an end of the controversy. She is not entitled to recover. If, however, she reserved the right to reclaim the property, she is entitled to recover, unless she assented to the sale of the whole interest in the negroes, by the administrator of her son, and induced or encouraged McMichael to buy. In that event she is equally barred, and cannot maintain the action which she has instituted.

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Now, while it may be conjectured that she did this, and the moral conviction is strong that she did, still there is no evidence that her acts or declarations, as testified to by Judge STARK, Col. Reid and wife, and others, were communicated to McMichael and came to his knowledge. And in the absence of any such proof, it must be presumed, that he acted upon his own knowledge and judgment. He admits in writing, that he took his negroes conditionally, but he is not sued for them, and his son swears, that Rufus W. McCune did so likewise. It is for these negroes, bought at the sale, that McMichael is sued. And that all the parties were present when this arrangement was agreed upon.

The issues therefore to be submitted to a future jury, are few and simple, and should be directly passed upon, without being encumbered by so much rubbish.

Judgment reversed.

CHARLES, WHELAN, plaintiff in error, vs. EDWARDS & HACKNEY, defendants in error.

A promise to pay a part of the debt of another in discharge of the whole, has no consideration to support it, unless that other be a party to the new contract.

Assumpsit, in Coweta Superior Court. Tried before Judge HAMMOND, March Term, 1859.

This was an action by Richard H. Edwards and William H. Hackney, merchants and partners in trade, under the name and firm of Edwards & Hackney, against Charles Whelan,

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for the recovery of one hundred and fifty dollars; and was predicated upon the promise contained in the following letter written by defendant, and addressed to *one* of the plaintiffs, to-wit:

“GREENSBORO’, April 30, 1856.

Mr. R. H. Edwards :

Dear Sir: I received yours of the 26th inst., the first word since I left Newnan. You say you will take the \$150, and be the loser that much. I regret that you should lose, but if you can tell who the gainer is, or ever will be in that transaction, I will feel obliged to you. Yet I hope that my son Francis will be the gainer by being able to take a retrospective view of his gambling, drinking, and general dissipation during several years past in your town. I hope the past will be by him received in such a way as to be a valuable lesson to him. I am led by his high regard for your person and interest only, to pay you the \$150; as to the value he received, God knows it was anything but value; his value was loss of sleep, loss of money, absence from his family and business; and worse than all, loss of character and practice. Yet, he says, you are one of his best friends; as such, I want you to advise and admonish and reprove him for the past, and caution him against the future. You are able to give him a lesson of experience. Be his friend, and I am yours.

CHARLES WHELAN.”

P. S.—“Will you risk my sending the money by mail to Newnan, having the letter registered, and take the postmaster’s receipt.
C. WHELAN.”

The defendant’s son, Francis, was owing plaintiffs, one hundred and seventy-two dollars and nine cents, besides interest, by four promissory notes, and the hundred and fifty dollars, promised to be paid in the foregoing letter, was in payment of those notes, and which defendant afterward refused to pay.

Plaintiffs proved by Richard M. Hackney, that at plain-

tiff's request, he called on defendant in the town of Newnan, and asked him, if he had written a letter to R. H. Edwards; he said he had, and that he did intend to pay \$150, but he had changed his mind, having been written to by so many of his son's creditors. Witness and defendant were talking about debts due by defendant's son to Edwards & Hackney; defendant said he was much obliged to them for waiting with his son; that he had sent the money to Hugh Bucharian to pay this debt, but did not send any instructions to him what to do with it; that he thought he had paid all his son's debts, but afterwards, receiving so many letters about his son's grocery debts, he concluded not to pay any more.

The presiding Judge charged the jury, who returned a verdict for the plaintiffs for \$150. Whereupon, defendant moved for a new trial, on the following grounds:

1st. That the Court erred in admitting the evidence of Richard M. Hackney, to prove that the promise contained in the letter of defendant, was a promise to pay to Edwards & Hackney, and not to R. H. Edwards—counsel for defendant objecting to the admission of the testimony at the time it was offered.

2d. That the Court erred in admitting said letter in evidence, the same not containing any promise to pay a debt due to Edwards & Hackney—defendant's counsel objecting to the same at the time.

3d. Because the Court erred in charging the jury, that the letter written by defendant contained a sufficient promise to pay the debt due by his son, William F. Whelan to Edwards & Hackney, provided plaintiffs had proved a consideration for said promise.

4th. Because the Court erred in charging the jury, that Edwards being a member of the firm of Edwards & Hackney, a promise made to him to pay a debt of the firm, was as binding as if made to Edwards & Hackney, provided they

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believed that defendant's undertaking was to pay a debt due to Edwards & Hackney.

5th. Because the verdict of the jury is contrary to law and evidence, &c.

The Court overruled the motion for a new trial. Whereupon defendant excepted, and assigned said decision as error.

BUCHANAN & WRIGHT, for plaintiff in error.

R. W. SIMMS, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

1st. The letter of Charles Whelan contains a reference to some debt which his son Francis owed to Richard H. Edwards; and upon the recognized principle of explaining a latent ambiguity, or to state the same thing in perhaps a more satisfactory form, upon the principle of reading the letter in the light of surrounding circumstances, when the debt to which reference is made is not stated upon the face of the paper, it was competent to show what debts existed, and perhaps even to show to which particular one the reference was made; but then the *parol* evidence should, as I think, have been in *harmony* with the letter, and not contradictory to it. The letter spoke of a debt to Edwards, the proof related to a debt to Edwards & Hackney. For my own part, I think the evidence was inadmissible. And for a similar reason, I think the letter itself was inadmissible. It did not support the declaration. The declaration sets forth a promise to pay a debt to Edwards & Hackney, but the letter shows a promise to pay a debt to Edwards.

2d. But while my colleagues were not quite content to repose upon the foregoing view, we are all agreed that there was no consideration to support the promise in this case. It is the naked case of a promise to pay the debt of another;

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there is no consideration, either of gain to the promisor or of loss to the promisee. It is too clear for argument, that there was no gain to Whelan, but it was said there was loss to Edwards. The letter (referring to another which Whelan had received from Edwards) does use this language: "You say you will take the \$150, and be the loser that much." This obviously was meant to say, "and be the loser of the *remainder*." He then adds: "I will give the \$150." True, here was an offer to accept one hundred and fifty dollars in discharge of the whole debt, and a promise to give it. But the son was not a party to that arrangement nor privy to it. Suppose Edwards had sued him for the whole one hundred and seventy dollars, would it have been any defence for him to say, "you have agreed to discharge me?" This is a test. Even if Edwards had got the one hundred and fifty dollars in money, what would prevent him from collecting the debt from the son? If another man pays my debt for me, without my consent, it is no payment for me. I remain liable. If this arrangement had been made between all three of the parties, the case would be very different. But as the case stands, to allow the recovery, would be for Edwards to lose nothing, but to get one hundred and fifty dollars from the father, and yet leave his demand against the son intact. If Edwards should enforce his claim against the son, after payment of the hundred and fifty dollars by the father, the latter might doubtless recover it back; but because he could recover it back, is a very good reason why he should not be made to pay it.

Judgment reversed.

EDWARD GRESHAM, plaintiff in error, vs. WILLIAM E. WEBB,
and E. M. WILLIAMS, defendants in error.

- [1.] A conveyance of land by one, against whom the land conveyed was held adversely by claim of title, is void. *Cain & Morris vs. Monroe*, 23 Ga. Rep. 52, overruled.
- [2.] Complaint in ejectment not amendable by striking out the old plaintiff and substituting another in his place. *Neall vs. Robertson*, 18 Ga. Rep. 399, affirmed.
- [3.] A perfect equity cannot originate in a contract, utterly void by law.

Complaint, for land, in Haralson Superior Court. Tried before Judge HAMMOND, April Term, 1859.

This was an action (brought in the form prescribed by the Act of 1847) by Edward Gresham, against William C. Webb, and Elihu M. Williams, for lot of land number 195, in the seventh district of Haralson county.

Plaintiff proved that the defendants had adverse possession of the land at the commencement of this suit, and had had for more than a year before. Plaintiff then offered in evidence a copy grant (having first proved the loss of the original) to John H. Goldsby, for the premises in dispute; also a deed duly recorded, from Goldsby to Harrison Crow, for the same. He then tendered in evidence a deed duly recorded from Crow to plaintiff; said deed dated 20th December, 1854. To the introduction of which last deed defendants objected upon the ground, that the same was made while defendants held the adverse possession of said premises, and that said deed was consequently void under the statute of 32d Henry 8th. The Court sustained the objection, and excluded the deed.

Plaintiff's counsel then moved to amend the declaration by inserting the name of Harrison Crow, as a plaintiff in the cause; which motion the Court refused.

Plaintiff then moved to submit the deed from Crow to himself, excluded as above, to the jury, the question being

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one of fact to be determined by them; which motion the Court also overruled.

To all which rulings and decisions counsel for plaintiff excepted, and assigns the same as error.

G. J. WRIGHT; and VASON, for plaintiff in error.

MERRELL, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Up to 1857, in the case of *Cain & Morris vs. Monroe*, 23 *Georgia Reports* 82, it had always been held in this State, that a conveyance of land by one against whom the land conveyed was held adversely by claim of title, was void. The contrary doctrine was ruled by a majority of this Court in that case. My brother STEPHENS who has taken the place of Governor McDONALD concurring with me, that the former adjudications were right, the old doctrine is reestablished, and I trust the rule thus resettled, will remain until changed by the Legislature; for upon this, and all other subjects involving the very foundations to property, there ought to be an end to questions.

Nothing is more common than to meet with such remarks as fell from Lord Chancellor Eldon, in the case of *Gee vs. Pritchard*, (2 *Sawnst. Ch. Rep.* 441.) In the remarks of the great English Judge, after stating the difficulty which pressed him upon the point under consideration, he adds, "but it is my duty to submit my judgment to the authority of those who have gone before me." Again, "the doctrines of this Court ought to be as well settled, and made as uniform almost as those of *the common law*." Still further, "I cannot agree that the doctrines of this Court, are to be changed with every succeeding Judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach, that the equity of this Court varies like the Chancellor's foot."

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It is for the sake of upholding the vital principle of uniformity and permanency in decisions, and not on account of the paltry gratification of my judicial pride, that I am glad to see this and all other important rules of property, steadfastly adhered to.

The deed from Crow to Gresham then being void, the defendant being in adverse possession of the premises in dispute, at the time the conveyance was executed, the plaintiff could not recover the land in his own name; neither could he amend by complaint by striking out his own name, and substituting that of Crow, his grantor, in lieu thereof. *Neall vs. Robertson*, 18 Ga. Rep. 399.

It is argued, that Gresham having purchased and paid for the land, he has a perfect equity, which will enable him to maintain the action. But how can a perfect equity accrue under a contract which is absolutely void?

Again, it is insisted that the deed should have been allowed to go to the jury, as the plaintiff might have shown that the possession of the defendant was not adverse when the land was sold.

The plaintiff's deed was executed in December, 1854; the suit was brought in August, 1855; and the plaintiff proves by his own witness, Mathew Reed, that the defendant had been in adverse possession, claiming the land as his own, for more than twelve months before the commencement of the action. Of course, therefore, the possession was adverse in December, 1855, when the deed from Crow to Gresham was made.

Judgment affirmed.

STEPHENS J. concurring.

BENNING J. dissenting.

At the time when the deed from Crow to Gresham, the plaintiff, was made, Webb & Williams, the defendants, were

in possession; Crow held a deed from one Goldsby, made in 1830; that deed was duly recorded. Goldsby was the drawer and grantee of the land. So, the title was in Crow. Webb & Williams were in the actual possession of the land; that was all of their title.

The Court below held the deed, from Crow to Gresham, void; and the majority of this Court have held it void. Judge STEPHENS, in delivering the opinion of the majority of the Court, stated, that he thought the deed void; made so, however, not, by the statute of the 32^d of Henry the 8th against bracerie and the buying of titles, but, by the common law; that he approved the decision rendered by a majority of this Court, in *Cain & Morris vs. Monroe*, 23 Ga. 82, which decision, was, that that statute is not in force; but that he considered this deed as one which, the common law made void, and that he held the common law to be in force.

Judge LUMPKIN then remarked, that he too thought the deed void by the common law, and that he had never considered more of the statute of *Henry the 8th* to be in force, than what was in affirmance of the common law.

I then said, that I was not prepared to give my assent to the position, that the deed was rendered void by the common law, that I had never heard the position argued; that I would examine it after the adjournment of the Court, and do my best, to bring myself to accept it; and that whatever the result of my examination was, I would make it known.

Accordingly, I have examined the position, and am constrained to say, that I cannot accept it. Why I cannot, I will now state.

The position involves two questions; one, whether the common law is such, that if in force, it would make the deed from Crow to Gresham, void; the other, whether if that be so, it is in force. These two questions in their order.

[1.] Is the common law such, that, if in force, it would make this deed from Crow to Gresham, void?

This question may be resolved into two other questions—

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these two. By the common law is there any restriction on the alienability of such a title as that of Crow's? If there is, is this deed of his, within that restriction?

What was Crow's title? He had a duly recorded deed, from Goldsby, and Goldsby was the drawer, and the grantee, of the land. Webb & Williams had the naked possession of the land, but that was all they had. They were mere original disseizors without any right, or color of a right. These things being so, the title of Crow, was, not merely a right of *action*, but it was a right of *possession*—a right of entry *by his own act* at his pleasure. 2 *Black. Com.* 195 *et seq.*

Now is there, by the common law, any restriction upon the alienability of such a title as this of Crow's?

By natural law, the alienability of property is without restriction; alienability makes a part, and a great part of the value of property. On those, then, who assert a restriction on the alienability of property, is the burden of showing, clearly, that there is some municipal laws which makes the restriction. Now is there any evidence that clearly shows the existence of any rule of the common law, which renders, inalienable, such a title, such a title as this of Crow's? I hardly think so.

There is, within my reach very little evidence on the question. The statute of the 32d *Henry the 8th*, was passed in 1540, more than three hundred years ago; and when it was passed, it took the place of the part of the common law, which imposed restriction or alienation, in the case of such a title as Crow's, if indeed there was any part of the common law, which did that; and all decisions on the subject, were, from the date of the statute, placed on the statute, and not on the common law. The reports, therefore, for the last three hundred years give us no decisions, as to what the common law was; and when we require decisions further back, we have to go to the year books, and they are not within my reach.

What other evidence there is, must come from some source not entitled to full confidence, for the decisions of the Courts are the best evidence of what the common law is. Of this inferior kind of evidence, there exists some within my knowledge, but it, I insist, is both scanty and conflicting. What is it? A dictum of *Lord Coke*; a similar dictum of *Chief Justice Montague*, certain dictums in echo of these. The preamble of the statute of the *32d of Henry the 8th*, which, is, I think, in conflict with the dictums. This is about all.

The dictum of Coke is, that nothing, in action, entry, and re-entry, can be granted over. *Coke L. 214, a.*

The dictum of C. J. Montague is: "Further, I take the statute, that if he who is out of possession, bargains or sells or makes any covenant or promise to part with the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he who so bargains, sells, or promises, have a good and true right and title or not; and in this point the statute has not altered the law, for the common law before the statute was, that he who was out of possession might not bargain grant or let his right or title, and if he had done it, it should have been void." 1 *Plow.* 88.

According to these dictums, if the owner was out of possession, he could not "grant," "bargain," or "sell," or, "promise" to do so. His being out of possession was enough; it was not necessary that another should be in possession. The dictums go to this extent.

But even these dictums do not go the length of saying, that a grant or assignment, by the owner though out of possession, would not be maintained in equity. We know that Courts of Equity, sustain the assignment of choses in action, and there is less of maintenance in selling a right of entry, than there is, in selling a chose in action, for the last, is no more than a right of action, while the first is a right to enter at pleasure, by your own act, into the possession of your own property. Courts of Equity also sustain assignments of a

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trust, made by the *cestui que trust*, although it may be, that the trustee is in possession, asserting title in full, in himself, and denying the trust.

So much for the evidence on one side; which is but dictums at best.

On the other side, there is, I think, some evidence, in the preamble to "the bill of bracerie and buying of titles" (32 Hen. 8). The terms of the preamble, I think, authorize the inference, that the opinion of the legislature was, that the buying of titles was not maintenance, but was something which it required a new law, to prohibit. The preamble, after reciting, that the "ministration" of the laws, &c., was "greatly hindered and letted, by maintenance, embracery, champerty, subornation of witnesses, sinister labor, buying of titles and pretended rights of persons not being in possession," &c., goes on thus; "For the avoiding of all which misdemeanors and buying of titles and pretended rights," &c. Now, if the Legislature had thought the buying of titles, maintenance, why should they have mentioned it here? Why should they not have been content to let it, with the other mentioned things, be covered by the word "misdemeanors?" Again, the expression, "which misdemeanors and buying of titles," implies in itself, that the buying of titles was thought not to be, a misdemeanor. Lastly, if the buying of titles was thought to be maintenance, why should it have been mentioned at all—maintenance having been mentioned? That word would cover it. At least, why should that species of maintenance be mentioned, and none of the many other sorts?

Indeed, so far as I can ascertain, the very expression—the buying of titles was imported into the law by this statute.

I set the evidence contained in this preamble, against the dictums aforesaid, and I ask, if it does not balance and over-balance them? Say, however, that it does not, then what is the extent of these dictums? Do they make rights of entry, wholly inalienable? I think not. Coke's expression is, that

rights of entry cannot be *granted*—Montague's, is that, he who is out of possession, "might not *bargain, grant or let*, his right or title." But this was not saying, that a right of entry is wholly inalienable, grants, bargains, leases, are only some of the modes of alienation; and they are all modes which are not accompanied, by livery of seizin. Feoffment, with livery of seizin, is another mode; and a man although having only the right of entry, is by virtue of that right, entitled to go on any part of the land, and when there, to sell it by feoffment, with livery of seizin. Indeed if the land is held adversely to him, and he is afraid to step over the lines, it is not necessary that he should do more, than go near to the land, and there make solemn *claim* to the land, and a livery *in law*.

Blackstone, speaking of the remedies for ouster, says, "The first is that extrajudicial and summary one," "of *entry* by the legal owner, when another person who hath no right, hath previously taken possession of lands and tenements. In this case the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession; which notorious act of ownership is equivalent to a feudal investiture by the lord; or he may enter on any part of it in the same county, declaring it to be in the name of the whole." "If the claimant be deterred from entering by menaces or bodily fear, he may make *claim*, as near to the estate as he can with the like forms and solemnities which *claim* is in force for only a year and a day. And this claim, if it be repeated once in the space of every year and a day, (which is called *continual claim*,) has the same effect with, and in all respects amounts to, a legal entry. Such an entry gives a man seizin, or puts into immediate possession him that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase." (3 *Bluck. Com.* 174.)

Thus then it appears, that a man having only the right of entry into land, might convey the land, if he would but go

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through the ceremony of a momentary entry on any corner of the land; or if, deterred by fear from doing that, he should go into the neighborhood of the land, and there make solemn claim to it. In other words, it appears, that whether he could convey the land, by grant, by bargain and sale, by lease, he could convey it, by feoffment, with livery of seizin.

If then we concede the dictums of Coke and Montague, what do they amount to? No more than this, that though the common law forbade the transfer of a right of entry, by grant, or bargain and sale, or lease, it did not forbid the transfer, by the easy mode above indicated, viz; a feoffment, with livery of seizin.

I insist, then, that there is no sufficient evidence of any restriction at all, by the common law on the alienability of a right of entry, but that if there is, it is confined to certain modes of alienation, and does not extend to the mode by feoffment and livery of seizin, and that this is a mode practicable and easy, in the case of a right of entry.

Was the deed of Crow's, made in this way—made with livery of seizin? The evidence is, on this point, silent. And in the absence of evidence on the point, I incline to think, that a Court should, if necessary to the validity of the deed, presume, that the deed was accompanied by livery of seizin. Crow was the true owner, and Webb and Williams were but original disseizors. I see not, therefore why the utmost liberty of presumption, is not to be exercised, in favor of Crow, as against them. A Court—at least a Court of Equity, frequently presumes livery of seizin, to prevent injustice and iniquity. And whatever a Court of Equity could presume, may not a Court of law also, presume? Does not the Act of 1820, put a Court of law, on the same footing, in this respect, with a Court of Equity?

My conclusions, then, thus far, are as follows:

First, there is no sufficient evidence, that the common law imposes any restriction at all, on the alienation of a right of entry—a right to take possession at will.

Secondly, if the common law does impose any restriction on that right, it confines the restriction to alienation unaccompanied by livery of seizin—a thing which may accompany the alienation of even a right of entry, for the person having that right, has the right to enter and make livery of seizin.

Thirdly, as Crow had the right of entry, when he made his deed to Gresham, we are, perhaps, bound to presume, that he did enter and make livery of seizin.

Whence, fourthly, it is by no means clear, that Crow's deed is void by the common law, even if there is a rule of the common law, which would make it void, unless it was accompanied by livery of seizin, for it may have been accompanied by livery of seizin.

This is my answer to the first of the two questions—the question, whether, there is any rule of the common law, which would make the deed from Crow to Gresham void.

[2.] But suppose me wrong in this answer—suppose it to be true, that, by a rule of the common law, that deed would be void, unless it was accompanied by livery of seizin, and, that it was not accompanied by livery of seizin—then the second of the two questions, demands attention—the question, whether this rule of the common law, is now in force in Georgia.

If there is any rule of the common law, which would make the deed from Crow to Gresham, void, it must be a rule which may be stated in some such words as these: A deed made without livery of seizin, by A. to B. for land held adversely by C. is void in every instance, even the instance in which, A. has the right of entry into the land, and therefore, the right, and the power, to make livery of the land. For, Crow had the right of entry into the land in question; his title was a regular chain from the State down to himself; Webb and Williams, the persons holding the land adversely to him, were mere original disseizors, neither of them holding by descent, or other derivative title; Crow, therefore, as

we have seen from Blackstone, had the right of possession, the right to redress himself by his own act of entry; and having that right, he had, as we have also seen from Blackstone, the right, and the power, to make livery of seizin of the land. It must be true, therefore, that if there is any rule of the common law, which would make Crow's deed void, it is a rule which may be stated in some such words as the words aforesaid, which have been used for stating it.

Now, to any rule susceptible of being expressed in these words, a part of the Act 1785, "to render easy the mode of conveying lands," &c., is, I say, directly repugnant. If I am right in this, the rule, if ever in force, was repealed by that Act.

The part of the Act to which I refer, is as follows:

"*Whereas*, many deeds of bargain and sale, and other deeds of feoffment or conveyance, have been made, which have not been enrolled or livery of seizin had, or may be different in point of form, when it was the legal intent of the party to sell and lawfully convey the same."

"SECTION I. *Be it enacted* &c., That no deed of feoffment, bargain or sale, and deed of gift, or other conveyance of lands or tenements whatsoever, heretofore made, shall be impeached or set aside, in any Courts of law or equity, for want of form, or livery and seizin, or enrollment, or for any other defect in the form or in the manner of the execution of any such deeds or conveyance, either in the first deed or in any of the *mesne* conveyances derived therefrom, so that the right were and would have been in the person or persons conveying, if such defects had not happened in such conveyance, or in the manner of the execution of the same as aforesaid."

"SEC. II. And to the end that such evils may be remedied in the future,"

"*Be it enacted*, &c. That all deeds of conveyance, by way of bargain and sale, *bona fide* of lands and tenements, and executed under hand and seal in the presence of two or

more witnesses and a valuable consideration paid, that are proved or acknowledged before a justice of peace, or before the chief justice or one of the assistant justices, and the said deed is registered by the clerk of the Court in the county where such lands or tenements lie, in a book by him to be kept for that purpose, within twelve months from the date of such deed, for which he shall receive four pence per copy sheet of ninety words; then, and in that case, such deed of conveyance by way of bargain and sale, shall be, and the same is hereby declared to be good and valid in law and equity, according to the true intent, construction and meaning thereof." (*Cobb*, 164.)

We may safely say, I think, that these words amount, at least, to this; that a deed, if witnessed, proved and registered, as they direct, shall even though not accompanied by livery of seizin, be good, in every case in which, there is in the donor, a "right," to convey with livery of seizin. And this, is directly repugnant to the supposed common law rule aforesaid, which is, that a deed made without livery of seizin, by A. to B. for land held adversely by C. is void, in every case—even in the case in which A. has the right of possession of the land, and therefore, the right, and the power, to make livery of seizin of the land. It therefore, repealed that rule, if the rule ever existed.

And the rule if so repealed, remains repealed, for there has been no Act to restore it.

I say, then, that the common law rule, if ever in force here, is no longer in force here.

I might, I think, stop at this point. But I will go a step or two further.

I remark, then, that all, or nearly all, the arguments adapted, to show, that the statute of the 32 of *Henry the 8th*, is not in force, are also adapted to show, that any such common law rule as this supposed one, is not in force. That rule and the statute differ in degree, not in kind—the statute being worse than the rule—but their rule is bad enough, I

think, to warrant us in believing, that the colonists would never have brought it with them to this new home. It was unsuited to their condition; it was calculated to retard the growth and settlement of the colony; it was against the spirit of commerce, which, even as early as the first colonization of Georgia, had become widely diffused in the mother country.

Lastly, I put this question, if we say, that such a common law rule as this, is in force—a rule which forbids a man, to sell land to which he has the right of possession, and which therefore, he may, *at pleasure, by his own act, enter upon and be seized of*, shall we not have to say, that all the similar common law rules are in force; or, the rule that the assignment of a chose in action, is maintenance, and therefore, void; the rule that a future interest in land is not assignable; the rule that possibilities are not assignable; the rule that the landlord cannot sell the leased land, without the consent and “attornment” of the tenant? A right of possession, is a much more nearly perfect thing, than any of these. Indeed, it is almost a perfect thing; what it lacks may be supplied by the mere act of its owner—he has but to step on his land, claiming it as his own, and the right becomes perfect—becomes a right in which, there is *juris et seisenæ conjunctio*. Nay, if afraid to step on the land, all he has to do, is to go near it, and make claim to it. A right of this kind, is more nearly perfect, than a chose in action, for a chose in action is a right, that can be asserted by an action at law only.

Upon the whole, then, my opinion is, that the deed from Crow to Gresham was valid. I must, therefore, persist in my dissent from the judgment of the Court.

Chastain vs. Town Council of Calhoun.

OBEDIAH CHASTAIN, plaintiff in error, vs. THE TOWN COUNCIL OF CALHOUN, defendant in error.

A. took out a license from the State, to retail spirits in Gordon county, in November, 1858. In December thereafter the Legislature passed an Act authorizing and empowering the common council of Calhoun, in said county, to levy and collect a tax, not less than one hundred dollars, upon any retail establishment, &c, in that place.

Held, That the statute was not intended to apply to one who had already paid the State, for the privilege of retailing.

Certiorari, in Gordon Superior Court. Decision by Judge CROOK, April Term, 1859.

This was a certiorari sued out by Obediah Chastain, against the Town Council of Calhoun, to reverse certain proceedings of said Council, imposing and levying a tax of one hundred dollars on petition.

The facts of the case are as follows: On the 18th day of November, 1858, Chastain obtained from the Clerk of the Inferior Court, of the county of Gordon, a license to retail spirituous liquors in said county, for the term of one year from the date thereof, for which he paid the license fee of \$5 00. On the 11th December, 1858, the General Assembly passed an Act, authorizing said Town Council of Calhoun to impose a "corporation tax not exceeding one hundred dollars, upon any and all retail establishments, for the retail of spirituous, malt, or intoxicating liquors of any kind, within the corporate limits of said town of Calhoun, and that all conflicting laws are hereby repealed."

Under the authority of this Act, the Town Council, on the 14th January, 1859, passed an ordinance imposing a tax of one hundred dollars on all persons then retailing, or who *might* thereafter retail liquors within the corporate limits of said town. The Marshal of said town proceeded to collect said tax of one hundred dollars out of Chastain, and he

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refusing to pay the same, an execution was issued and levied upon his property.

At the hearing, the Judge of the Superior Court dismissed the certiorari, and affirmed the proceedings of respondents—the said Town Council. To which decision counsel for Chastain excepted.

FRANCIS, for plaintiff in error.

DABNEY, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The plaintiff in error had, previous to the passage of the Act of 1st December, 1858, obtained from the State, a license to retail spirituous liquors, in all and every part of Gordon county; consequently, in the town of Calhoun, the place of his residence, where he prosecuted his business. He was in the exercise of this right, when the additional corporation tax of one hundred dollars was imposed upon him.

If the Act admits of two interpretations, and we think it does, that should be adopted most favorable to the tax payer. The Town Council of Calhoun were authorized and empowered to impose a corporation tax of any amount not exceeding one hundred dollars, upon any and all retail establishments, &c. (See *Pamphlet Acts*, 1858, page 130.) It is undoubtedly true, that the language of the statute is comprehensive enough to include those already selling under a license; but it does not necessarily apply to such. And we think it more consonant to principle to hold, that the power delegated to the corporation was only intended to be exercised when the State authority, over the subject of retailing, was withdrawn, as it will be when the present license expires.

To hold otherwise would involve this anomaly. Calhoun would be the only place in the State where a citizen

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would be double-taxed for the privilege of retailing spirits. The general law withdraws the jurisdiction of the State as to retail licenses, from all those towns which by law have the authority to levy a corporation tax upon this business.

When Chastain entered upon his traffic, he had no right to anticipate the imposition of this heavy additional tax; and he is involved in this dilemma namely: either to relinquish the money which he has expended, and the business also in which he has invested his means, or to pay an additional sum of one hundred dollars, for the privilege of prosecuting a pursuit which he supposed he had already paid for. Give him an opportunity when his present license expires, to decide whether he will continue in the trade with this superadded tax, or abandon it for some other. This is fair play.

By the literal reading of the law, the tax of one hundred dollars might be assessed, regardless of time, as an income tax upon property or professions; and such may have been the meaning of the Assembly; but such, we apprehend, was not their meaning. There is so much obscurity in the Act that it requires construction, and cannot well be enforced without it. The interpretation we have put upon it, we believe to be the most reasonable and just.

Judgment reversed.

BALINGER GRAVELY, plaintiff in error, vs. **AMOS L. SOUTHERLAND**, defendant in error.

Where every charge in complainant's bill, upon which its equity depends, is fully met and denied by the defendant, the injunction will ordinarily be dissolved;

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especially when it is to restrain the collection of a debt, of more than thirty years standing, and for the recovery of which, a judgment has been obtained at law, upon the confession of the defendant.

In Equity, in Polk Superior Court. Dissolution of injunction, by Judge HAMMOND, April Term, 1859.

This was a bill to enjoin a judgment at law, for discovery, relief, &c., filed by Balinger Gravely against Amos L. Southerland.

The bill alleges that in the year 1831, complainant, then of the State of South Carolina, gave to one Amos L. Southerland, since deceased, his promissory note for \$200. \$100 due 25th December, 1831, and \$100 due 25th December, 1832. That he paid the first installment about the time it became due, and it was so credited on the note. That he paid upon the second installment the sum of \$59 38, by an account against said Southerland, but which was never entered as a credit on the note; that complainant moved to the State of Georgia, in the year 1833; that Southerland the payee of the note died in South Carolina the same year, and after complainant had removed; that in 1836, he paid \$18, which was credited on said note, leaving then due on said note a balance of \$32 97, and which sum with interest thereon, is justly due, and which complainant is ready to pay; that afterwards, in 1845, the defendant, Amos L. Southerland, the son of the payee, applied to complainant and agreed that if he would give him a new note, that he, defendant, would return in the fall thereafter, and allow said credits and payments, and represented to complainant that he desired it so arranged at that time, in order that the heirs might see the amount of the claim originally, and that they would then settle, by deducting the credits, to which complainant was entitled that complainant having married the cousin of defendant, relied on said promise, and said defendant knowing of said relationship, falsely and fraudulently availed himself of it, and procured the new note aforesaid, leaving

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out the credits, to which complainant was entitled; and complainant gave to him his note under seal, due one day after date, for the sum of \$204 25.

The bill further states, that defendant did not return, and allow complainant the credit which he had promised to do, and which complainant was entitled to have entered on said note, but sued out bail process on said note against complainant, returnable to the March Term, 1854, of Polk Superior Court, and at the September Term, thereafter, complainant confessed judgment for the amount of said note, with interest thereon, reserving the right of appeal; that on Monday thereafter, it being within four days from the adjournment of said Court, complainant went to the clerk's office, and applied to enter his appeal, and was informed by the deputy clerk, the principal clerk being absent, that he need not then attend to it, but to wait until his attorney should return, and that there was ample time; and complainant relying on this statement, returned home without entering his appeal, and rested contented until about two weeks thereafter, when upon intimation that he would be too late, he again went to the deputy to enter said appeal, which the deputy refused to do, and issued execution upon the confession, and which execution now in the hands of the Sheriff of said county, has levied on the property of complainant, and the same is advertised for sale.

The bill further alleges, that at the time said confession of judgment was given, complainant did not know that he could prove the payments which he had made on said note, but he has been lately informed, by a letter received from the State of South Carolina, that he could prove the fact of said payment by one Pleasant E. Ladd, of that State, and others residing there.

The bill prays that the judgment at law be set aside and declared null and void, and that defendant be decreed to receive and accept from complainant the balance due on said

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note, in full payment and satisfaction thereof, or that said note be reformed according to said agreement, and the facts of the case, and that said judgment and execution be perpetually enjoined, &c.

Defendant answered the bill, and upon the coming in of the same, moved that the injunction be dissolved, on the ground, that the equity of the bill was fully denied and sworn off by said answer.

The Court sustained the motion, and dissolved the injunction. To which decision counsel for complainant excepted.

CHISHOLM & WADDELL, for plaintiff in error.

FIELDER & BROYLES, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Concurring with the Court below, that every material allegation in complainant's bill, upon which its equity rests, is fully denied by the defendant in the answer, we affirm the judgment dissolving the injunction. When a debt has been due for more than thirty years, it should require a strong case, to restrain a judgment which has been rendered at law, and that too upon the confession of the party, and from which no appeal was entered, within the time limited by law for that purpose.

Judgment affirmed.

LITTLETON SMITH, plaintiff in error, vs. JOHN T. MORRIS,
defendant in error.

Where the process is endorsed on the back of the writ, it is sufficient, without stating the case, or naming the defendant; and were it defective, it is amendable.

Trover, in Carroll Superior Court. Decision by Judge HAMMOND, April Term, 1859.

This case being called, and the parties having announced ready, and a jury being empaneled to try the issue, counsel for defendant moved to dismiss the action on the ground, that the process was incomplete, and void, in this, that the *name* of defendant was not set out therein, but was wholly omitted. It appeared that the process was on the back of the declaration, and on the same sheet or leaf of paper, in the following words, to-wit:

“**GEORGIA**—To the Sheriff of Carroll county, greeting:

The defendant is hereby required personally or by attorney to be and appear at the next Superior Court to be held in and for the county of Carroll, on the first Monday in October next, then and there to answer the plaintiff's demand in an action of trover, as in default thereof, said Court will proceed as to justice shall appertain. Witness the honorable **DENNIS F. HAMMOND**, Judge of said Court, this 14th day of September, 1858.

(Signed,)

JOHN LONG, Clerk.

A copy of the declaration with this process thus endorsed had been served on defendant, and an entry thereon to this effect, signed by the Sheriff.

The Court held the objection good, and the defect fatal, upon which, counsel for plaintiff moved, that the Clerk be allowed to amend the process, by stating the names of the parties plaintiff and defendant, above, or in the margin of

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the process, in the usual form, the omission being a mere clerical one.

The Court refused the motion to amend, and dismissed the action. To which decision, counsel for plaintiff excepted.

W. W. & M. F. MERRELLS, by THOS. W. J. HILL, for plaintiff in error.

BUCHANAN & WRIGHT, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The objection to this process would, no doubt, be good at common law. For there the process is independent of the declaration, which is not filed until after the defendant has been brought into Court, by means of the process. Hence it must be full and complete of itself. Not so, however, under the Judiciary Act of 1799. That requires the process to be "annexed" to the writ. They must, therefore, be taken together. By the process, the Sheriff is commanded to summon the defendant to appear at the next Term of the Court to which it is returnable. The writ shows who the defendant is. Thus identified, he was served by the Sheriff, did appear, and filed his defence to the action. We hold the process was good.

Were it deficient, it is amendable under the ninth section of the Judiciary Act, which the plaintiff proposed doing, but was refused by the Court.

Judgment reversed.

SCRANTON, KOLB & Co., plaintiffs in error, vs. RENTFROW & BROTHER, defendants in error.

Evidence sufficient to support the verdict.

Assumpsit, in Fayette Superior Court. Tried before Judge BULL, March Term, 1859.

This was an action of assumpsit by Scranton, Kolb & Co., merchants of Augusta, Georgia, against Stephen Rentfrow and Bucket Rentfrow, partners in trade, under the name and style of Rentfrow & Brother, on several promissory notes, amounting in the aggregate to about six hundred and twenty dollars. All the notes were signed, "*Rentfrow & Bro.*"

The issue submitted to the jury, was upon the plea of Bucket Rentfrow, one of the defendants, who pleaded, that at the time said notes were given, he was not a partner of Stephen Rentfrow, or a member of the firm of Rentfrow & Bro., and that his name was signed by said Stephen, without his knowledge, consent or authority.

At the trial, the following evidence was adduced :

Robert Johnson, testified : That in 1855, he sold a barrel of brandy to Stephen Rentfrow, and afterwards called on Bucket Rentfrow for the money, to pay Jeptha Landrum, for a still, which he, witness, had bought from him. Landrum was owing Bucket Rentfrow, and said that it would answer him the same as money to settle it with Bucket, and in that way the debt was settled by Bucket Rentfrow with witness for the brandy.

William Johnson, testified : That in the spring of 1855, he bought of Stephen Rentfrow, out of the grocery, a barrel of mackerel ; that shortly afterwards, he saw Bucket Rentfrow in Fayetteville, who was owing witness for work done for him, and asked him for the money, when Bucket asked witness if he was not owing in the grocery ; witness said he

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was; Bucket and witness then went to the grocery, and Bucket went behind the counter and settled the account. Stephen Rentfrow was present at the time, and remarked to witness that the account was settled.

H. F. Underwood, testified: That he had seen boxes and barrels of goods and groceries received, marked "Rentfrow & Brother;" had seen them in 1855, 1856, and 1857; had seen some marked to Stephen Rentfrow; that the first and last received were marked Rentfrow & Brother; had frequently seen Bucket Rentfrow about the grocery when these goods were received, marked Rentfrow & Brother. Stephen Rentfrow generally attended to the business; once knew him to offer to sell out the grocery; was about to sell it to witness and George Ware; the sale was to be kept secret. Thinks they commenced business as far back as 1855, probably 1854.

W. IV. Bosworth, testified: That he saw goods received at the grocery, marked Rentfrow & Brother, in 1855, 1856, and 1857; had also, during the time, seen some marked Stephen Rentfrow; those marked to Stephen, were bought in the spring of 1856; that he went with Stephen Rentfrow to Augusta, in April or May, 1856, and Stephen went to a different house from the one they formerly traded with, to buy groceries, and witness supposing that he and Bucket were in partnership, told the proprietors of that house that the debt was good. That he and Rentfrow being the only persons at that time, who kept retail groceries in Fayetteville, agreed to raise liquor to ten cents a drink, which they did upon their return. Afterwards, Bucket Rentfrow called on witness and asked him what he thought of the propriety of raising the price of liquor, saying at the time, that his reason for asking was that he was interested in the business. Had an account with Rentfrow's grocery and settled it with Stephen, but don't remember whether the receipt was signed "Rentfrow & Brother," or "Stephen Rentfrow." Stephen generally attended to the business.

Johnson Whatley, testified: That he had a conversation

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with Bucket Rentfrow in 1855 or 1856, and asked him how he and Stephen were getting along ; he replied, that Stephen was selling a good deal, but he did not get much profits ; witness remarked to him, that perhaps he was getting a good deal out of the grocery himself. Bucket did not deny being a partner ; thinks they commenced business in 1854 ; had seen barrels come marked to Rentfrow & Brother. Bucket Rentfrow was a farmer, and Stephen attended to the business, settled accounts, &c.

L. F. Blalack, testified : That he had seen goods received at the grocery, marked Rentfrow & Bro. They commenced business in 1854 ; he was in market with Stephen Rentfrow, when he bought perhaps his first stock. Had seen Bucket frequently in Fayetteville, at the grocery.

J. L. Blalack, testified : That after the stock of groceries were levied on, in 1857, Bucket Rentfrow applied to him, to know if he could claim them. Witness informed him that he could not, as he had stated to witness, that he had only agreed to let Stephen have the use of his name to get the first stock, and that he was to have one-half the profits realized. Bucket said he had not been interested since that time, which was in 1854. Witness advised him that he could not claim the goods ; did not think that constituted him a partner ; had a small account at the grocery and settled it with Stephen ; don't remember whether he took a receipt or not. The conversation above referred to with Bucket Rentfrow, was after the 3d March, 1857.

M. M. Tidwell, testified in substance : That in the latter part of the year, 1855, Bucket Rentfrow called on witness to know if he had sold a certain house and lot in Fayetteville, to Stephen Rentfrow. Witness informed him that he had agreed to do so ; Bucket said he did not want witness to sell it to him if he could avoid it ; that Stephen did not need so large and costly a house, and had nothing to pay for it, except what he got out of the grocery, and that it would all be coming out of him, Bucket ; that he had gone into the busi-

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ness with Stephen to give him a start again, and that it looked like the way, he, Stephen was doing, would ruin him; that there were several debts against them which he would have to pay; that he understood Stephen was gambling, and that he had told him of debts which he had paid, which he, Bucket, afterwards found out had not been paid; that Stephen and his wife, or intended wife, were dressing fine, and living well, and all was coming out of him. Witness had a small account with Stephen Rentfrow, and settled it with him; had known him to sue on accounts in his own name.

W. W. Matthews, testified: That in 1857, he was Sheriff, and in April or May, of that year, levied on the stock of groceries, after which Bucket Rentfrow asked him if he did not think he was doing wrong to have his interest locked up.

The notes sued on were dated as follows: One 6th August, 1855; one 30th December, 1855; and one 6th March, 1856. All signed "Rentfrow & Bro. Here the testimony on the part of the plaintiffs closed.

Defendant offered no evidence.

The Court charged the jury, that if Bucket Rentfrow held himself out to the world as a partner, and permitted Stephen to buy goods in the name of the firm, or to use the firm name to procure credit, then he was liable to those who gave the credit, even if no agreement or contract of partnership was proved, and even if he had no beneficial interest in the concern.

The jury found for the plaintiffs against Stephen Rentfrow only, the sum of \$522 25, and plaintiffs moved for a new trial on the following grounds:

- 1st. Because the verdict is contrary to law and evidence.
- 2d. Because the verdict is not only against law and evidence, but decidedly against the weight of evidence.
- 3d. Because the verdict is against the charge of the Court.

DAVIS vs. HENSON, Sheriff.

The Court refused the motion for a new trial and plaintiffs excepted.

TIDWELL & WOOTEN, for plaintiffs in error.

BLALACK; and HUIE & CONNOR, *contra*.

By the Court.—BENNING J. delivering the opinion.

We think, that there was evidence enough to support the verdict. And the case was submitted to the jury by the Court under a charge very favorable to the plaintiff in error. We cannot say, that the refusal of the new trial by the Court, was an improper exercise of discretion.

Judgment affirmed.

WILLIAM F. DAVIS, plaintiff in error, vs. WILLIAM C. HENSON, Sheriff, defendant in error.

The Homestead Exemption Acts in this State, do not protect property from judgments founded on *torts*; they apply expressly and exclusively to judgments founded on *contracts*.

Rule against Sheriff, in Union Superior Court. Decision by Judge RICE, May Term, 1859.

This was a rule taken out by William F. Davis, against the Sheriff of Union county, to show cause why he had not made the money on a certain execution in his hands, issued in favor of said Davis, against William Jackson. The Sheriff answered, that, under and by virtue of said execution, he had levied on a certain lot or parcel of land

Davis vs. Henson, Sheriff.

belonging to defendant, which was claimed by him as exempt from levy and sale, under the homestead exemption Acts. To this plaintiff replied, that said execution issued upon a judgment obtained in an action of slander against defendant, and that the exemption laws did not apply or extend to judgments recovered in cases of *tort*, but only to those obtained in cases *ex contractu*.

The Court held the showing sufficient, and decided that the land was exempt from levy and sale under the provisions of the Acts exempting a certain quantity of land from levy and sale, &c., and discharged the rule. To which decision counsel for plaintiff excepted.

WILLIAM MARTIN, represented by EZZARD, for plaintiff in error.

No counsel appeared for defendant in error.

By the Court.—LUMPKIN J. delivering the opinion.

The single question in this case is, whether the Homestead Exemption statute in this State, protects property from judgments founded *on torts*? An inspection of the several Acts, shows clearly that they do not, but that they apply expressly and exclusively to judgments founded on contracts. *Cobb*, 385, 389, 390.

Whether this discrimination should be made, it is for the Legislature, and not for the Courts to decide.

Judgment reversed.

Sawyer, adm'r, vs. Flemister.

JOHN L. SAWYER, administrator, plaintiff in error, vs. C. A.
J. FLEMISTER, defendant in error.

Where the intestate has an estate only for his life, no interest in the property can pass to his administrator, and the administrator can have no right to bring suit for the property, but that right must be in others.

In Equity, in Newton Superior Court. Decision on demurrer, by Judge CABANISS, March Term, 1859.

In the year 1850 John Sawyer departed this life, leaving a will, the third and fourth items of which are as follows, viz:

"Item Third. I give and devise to my beloved wife, Mary, all my estate, both real and personal, embracing lands, negroes, horses, stock, household furniture, and utensils of every description; money, rights and credits, and whatsoever other things I may possess, to have and to hold during her widowhood, and to exercise full control over in the sole, management and disposition thereof as she may think proper, and to give off to her children whatever portions she may see proper, either before or at her death: *Provided*, that if my wife, Mary, should intermarry after my death at any time, then, and in that event she is no longer entitled to the above bequest; but my entire estate, both real and personal, shall then be equally divided among my said wife and all my children, she receiving a child's part; and in the event of such equal division ever being made, then whatever may have been advanced to any of my children, either by myself, during my lifetime, or by my wife after my death, shall be taken into the account, and every one share accordingly."

"Item Fourth. I desire and direct, that my wife, Mary, during her widowhood, may give off whatever of my estate she may see proper, at any time before or at her death, to my children, to each one in whatever proportion she may desire, and at whatever time she may see proper: *Provided*,

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that whatever she may give to my daughter, Sarah A., wife of Henry Camp, shall be made over to her and her children, not subject to the debts or control of her husband."

By the fifth item, he appointed his wife, the said Mary, executrix, and his sons, John L. Francis and Thomas Sawyer, executors of his will.

Under this will, Mary Sawyer, the widow, took possession of the entire estate of her husband, and held the same until the 6th November, 1854, when by a deed duly executed, she made a division of said estate between herself and her seven children, giving to each an equal share, and reserving to herself one share; being one eighth of said estate, to be held in fee simple "according to the directions given in the latter clause of the third item of said last will and testament of my" (her) "deceased husband, John Sawyer, late of said county: *Provided*, that nothing in the foregoing deed of gift shall be so construed as to prevent me" (her) "from retaining for myself, out of said estate, any property, not exceeding in value my distributive share as herein set forth, which I may think best suited to my condition and circumstances during my natural life, to be equally divided among all my children aforesaid, and their heirs and assigns after my death," &c.

The estate was partitioned in pursuance of this deed, and Mrs. Sawyer selected and retained as her share, two negroes, worth about a thousand dollars each, and cash and notes amounting to about thirty-five hundred dollars.

Shortly after this division, Mrs. Sawyer entered into an agreement under seal, with Creighton A. J. Flemister, one of her sons in law, dated 6th January, 1855, whereby, in consideration that Flemister would support and maintain her during her life, and furnish her with money sufficient to meet her ordinary wants and necessities, &c., she sold and conveyed to him all her interest in said two negroes; also, the use and control of her money and notes, to remain in his possession, and under his control, during her life.

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Afterwards, in 1855 or 1856, Mrs. Sawyer departed this life intestate, and John L. Sawyer, one of her sons, took out letters of administration on her estate, and filed this bill in equity, against Flemister, for a recovery of said negroes and money, and for an account of hire and interest.

To this bill defendant demurred, on the ground, that under the will of John Sawyer, deceased, Mary Sawyer, his widow, and complainant intestate, took only a life estate in the property devised and bequeathed to her, or a life estate, with a power of appointment, and that complainant as *her administrator* could not maintain this suit.

The Court sustained the demurrer and dismissed complainant's bill, and complainant excepted.

HARPER, for plaintiff in error.

FLOYD, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the right to sue, in the administrator of Mrs. Sawyer? If it was not, the Court below did not err in sustaining the demurrer.

If the interest which Mrs. Sawyer had in the property sued for, was no greater than an interest for her life, then, at her death, no interest remained to pass to her administrators; and therefore, no right to sue for the property, could be in him. •

Whatever the interest was which she had in the property, she must have derived it, either from the will of her deceased husband, or from her own deed and its acceptance by the remaindermen.

If it was derived from the will, it could not have exceeded an interest for her life, as she remained a widow till her death, and the will gave her, in case she remained a widow, no greater estate than one during her widowhood.

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If the interest in the property, was derived from the deed and its acceptance by the remaindermen, still it could not have been a greater interest, than one for her life; because the deed itself said, that the property should, at her death, be equally divided among certain persons named. This restricted her interest in the property, to an interest for her life, and gave the remainder to those persons.

Whether then her interest was an interest derived from the will, or an interest derived from the deed, it was but an interest for her life. It follows, that, at her death, there was none of it left, to pass to her administrator, and, therefore, that he had no right to sue for the property or for any interest in it. And, thence, it follows that the demurrer was good, and that the judgment holding it, good, was right.

The plaintiff seems to think, that it is his business, as Mrs. Sawyer's administrator, to collect this money and property, for the remaindermen, or, for whoever may be entitled to the same. But they do not need his services. They can themselves assert whatever rights they have. Perhaps, they are not willing to accept his services; perhaps they would even if he succeeded in this suit, and recovered the property for them, choose to sue for it, themselves. In that case, the defendant would be in a bad condition, for the recovery in this suit, would be no bar to that suit; and so, he would have to respond a second time for the property.

Judgment affirmed.

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Camp vs. Matheson & Ohara, et al.

NATHAN F. CAMP, plaintiff in error, vs. **MATHESON & OHARA**,
and others, defendants in error.

Where a creditor takes goods from his debtor on sale, in satisfaction of the debt, with a condition that the debt shall be re-opened and be collected if the goods should be taken away from him by older liens against the debtor, the creditor will not be enjoined, even before the condition has happened, so long as older liens remain outstanding, and the condition, therefore remains in possibility, from putting his debt into judgment, in order to be in readiness to meet the condition to the best advantage whenever it may happen. He does no wrong, and will not be restrained, until he attempts to enforce his judgment.

In Equity, in Butts Superior Court. Decision by Judge CABANISS, at chambers, 8th October, 1858.

This was a bill filed by Nathan F. Camp, alleging, in substance, that complainant, as the successor of N. F. & J. B. Camp, merchants, was indebted to Matheson & Ohara, Cameron, Webb & Co., James E. Speer, and Bridges, Dygart, & Orrell, in the aggregate, amounting to about two thousand one hundred dollars; that being in embarrassed circumstances, and unable to meet promptly his debts one Alexander Allmong presented himself as the agent of the above named creditors, and demanded payment of the debts, or that some arrangement should be made for their liquidation or settlement; that not being able to pay said debts by cash, and there being other large demands against him, some in judgment, he and said Allmong, as the agent of the above named creditors, entered into the following agreement, viz:

GEORGIA, BUTTS County.

This agreement entered into this the sixteenth day of June, 1856, between Nathan F. Camp, of the county and State aforesaid, and Alexander A. Allmong, attorney at law, and agent in fact, for William Matheson & William Ohara, merchants and partners under the firm name of Matheson & Ohara, George H. Cameron, William S. Webb, and Wil-

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liam M. Sage, merchants and partners, under the firm name of Cameron, Webb & Co., and James E. Speer; all of the city of Charleston, in the State of South Carolina; and also of Bridges, Dygart & Orrell, of the city of New York, and such other demand against the said Nathan F. Camp existing, as to make the sum of \$5,095 25. Witnesses that the said Nathan F. Camp, for and in consideration of the sum of money, in the nature of principal interest and cost of suit now pending, due on the said several described promissory notes, has this day bargained and sold, and by these presents doth bargain and sell unto the said Alexander A. Allmong, attorney and agent as aforesaid, all his stock in trade, goods, wares and merchandize now in his store in Jackson, Butts county, at cost of said goods. And the said Nathan F. Camp further agrees (that inasmuch as there are executions to a very considerable amount outstanding, which may seize and consume the before described goods, stock in trade, wares and merchandise) to warrant and defend the title thereto, and in the event of their being legally appropriated to older and superior claims, that the before described claims represented by the said Alexander A. Allmong, shall continue in full force and effect; be prosecuted to judgment and execution, and otherwise satisfied, as if this agreement had never been made. And the said Alexander A. Allmong, on his part, hereby agrees to accept and receive the herein before described stock in trade, goods, wares, and merchandise for, and at the sum of \$5,095 25, the same being the aggregate of his said claims, in full satisfaction and payment of said demands, upon the condition herein before named and specified.

June 16th, 1856.

(Signed)

N. F. CAMP, [SEAL]

A. A. ALLMONG, [SEAL]

Agent and att'y.

Signed and acknowledged in the presence of

J. R. McCORD, J. P.

The bill further states, that in pursuance of said agreement, complainants turned over and delivered said stock of goods to the agent of defendants, who took possession of the same and has sold some twelve or fifteen hundred dollars worth of said goods; that the meaning and understanding of the parties were, and such is the true construction of the said agreement, that after paying the demands of the defendants amounting to about twenty-one hundred dollars, the remainder of the \$5,095 25, agreed to be paid for said goods, should be paid and applied by said Allmong, as agent aforesaid, to other debts and demands against complainant.

The bill further states, that the judgments existing at the time of said sale, has since been levied upon other property of complainant, and the same has been sold at a sacrifice, and that said Allmong has failed to pay and apply said remainder, or any part thereof, to said judgments, or to any other demands against complainant, and complainant charges that the defendants do not intend to comply with their contract with him above set out. The bill further charges, that "said defendants have been fully paid," and although they have said goods still in their hands, and under their control, yet they still hold their demands against complainants, and part of which are in suit, and they refuse to deliver up said notes.

The bill prays that defendants be decreed to pay to complainant the amount in their hands, remaining of the \$5,095 25, after paying their demands of about \$2,100 00; that defendants be restrained from paying any debts against complainant, and if any have been paid by them, that they answer and set forth what amounts; and that an injunction do issue, restraining defendants from trading the notes and demands held by them against complainant, and that the same be delivered up; that the suits thereon be enjoined; that they be enjoined and restrained from selling or removing said goods, and that the Sheriff of the county

Camp vs. Matheson & Ohard, et al.

be ordered and directed to take charge of and hold the same, &c.

The Chancellor refused to sanction the bill and to grant the injunction. To which decision, counsel for complainant excepted, and assigned the same as error.

BAILEY; and DOYAL, represented by GIBSON, for plaintiff in error.

FLOYD; and PEEPLES, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

To state this case is to decide it. The complainant entered into a written contract with the agent of the defendants, *selling* them his stock of goods for the sum of \$5,095 25, which he owed to these defendants, together with other creditors, all of whom were represented by the same agent, the agent stipulating to accept the goods in full satisfaction of the debts, unless the goods should be taken away from his principals by existing liens, and the complainant stipulating that if they should be so taken away, these debts represented by the agent, should *not* be considered as satisfied, but should be open against him, and might proceed to collection. This was his bargain as exhibited by himself in the writing. His complaint is, that this was *not* the bargain. An inspection of the paper renders the question too clear for hesitation. The whole complaint is, that the defendants are doing, and the whole prayer is, that they *may* be restrained from doing, precisely what he agreed *they* should do. It is needless to make specifications. The *only* part of the case which bears any plausibility, is the allegation that the defendants are proceeding to collect their *debts* (which were satisfied by the sale of the goods) by suit, and the prayer that they may be restrained from proceeding *with* their suits. The contract was, that these claims were *satisfied*

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by the sale, unless the goods should be taken by the older liens, and it is not stated that the goods had been so taken. The argument is, that the claims yet remain satisfied, as the condition on which they were to be turned loose again for collection, has not happened. The answer is, in the first place, that to make this point good, it ought to be affirmatively alleged, that the goods had *not* been taken from the defendants. But, in the next place, he has no right to have the suits stopped before the claims are put into judgment. The defendants, on the contrary, have a right to reduce their claims to judgment, in order to have them in a form, to be immediately collected, whenever the condition happens on which the collection was to take place. It is not averred (but the contrary is inferable from the bill) that the happening of that condition has become impossible, by the payment of all older liens. So long as it remains possible, the defendants have a right to put themselves in readiness to meet it to the best advantage. So long as they keep within the limits of this discreet preparation, as they will do until they attempt to enforce their judgments, they are doing nothing wrong, and nothing from which they should be restrained. We sustain the Judge in refusing his sanction to this bill.

Judgment affirmed.

WILLIAM M. BELL, plaintiff in error, vs. JOSEPH C. MCCAWLEY, executor of JAMES HAMPTON, deceased, defendant in error.

[1.] Muniments of title proven to have been in existence for forty years, with possession in conformity, and coming from the proper custody, are admissible as ancient documents.

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- [2.] A recorded deed of personal property is entitled to go in evidence without other proof.
- 3.] The presumption of a gift arising from the delivery of personal property by a parent to a child, may be rebutted by subsequent acknowledgements of the child that he is holding, and had held from the beginning, under a loan.
- [4.] The doctrine that a purchase for value, without notice, takes precedence of a prior gift, applies only to a case where the two conflicting titles are derived from the *same source*.
- [5.] The contents of a lost paper are not to be inferred from a *name* which the witnesses may give the paper, in opposition to proof of its terms. The contents determine the name, and not a name the contents.

Trover, in Cherokee Superior Court. Tried before Judge HAMMOND, March Term, 1859.

This was an action of trover brought by James Hampton, against William M. Bell, for the recovery of certain negroes, to-wit: Rose and Mary; and the children of Mary, viz: Moses, Hannah, and Ben.

The facts of this case are briefly these: Sometime prior to the year 1790, John Hampton, intermarried with Joice Malone, the daughter of William Malone, the parties at the time residing in Newberry District, South Carolina. On the 10th December, 1790, in consequence, it seems, of the contemplated removal of Hampton to the State of Georgia, Malone and Hampton entered into and executed what is termed by them a "*memorandum of agreement*," whereby, after reciting that Malone had loaned to him, in consequence of his marriage with his daughter, a negro girl named Hannah, Hampton "binds himself, his heirs and assigns, whenever he or they may be called on by the said William, to deliver said negro woman, and increase, if any, to the said William, or his assigns," &c.

Afterwards, on the 27th October, 1797, the same parties signed and executed a "*memorandum of agreement*," reciting that Malone had loaned a negro boy, named Benjamin, to Hampton and wife, to be returned when demanded. In this paper it is recited that Malone is "of Oglethorpe coun-

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ty, and John Hampton of Washington county, both of the State of Georgia." Afterwards, on the 23d December, 1807, John Hampton signed an instrument, certifying that he had that day received from William Malone, his wife's father, two negroes, Hannah and Benjamin, and binding himself, his heirs, executors and administrators, "to deliver unto the aforesaid Malone, Sr., the said negroes, Hannah and Benjamin, or either of them, whenever he may call on me for the same." Witnessed by John Henley, Jr., and Daniel Johnson.

On the 14th December, 1811, William Malone executed a deed of a gift, by which he granted and conveyed to *James Hampton*, his grand-son, (being a son of the said John and Joice Hampton) "all his right, title, interest, claim and demand" in and to said negroes, Hannah and Benjamin, and their issue. This deed was executed in the presence of two witnesses, one of whom was a Justice of the Peace, and recorded in the office of the Clerk of the Superior Court of Jackson county, 16th September, 1812.

Sometime after the execution of this deed of gift, it is alleged, that the said James Hampton, the plaintiff, executed a *bond*, or instrument in writing, by which he conveyed to his father and mother, the said John and Joice, a life estate in and to said negroes and their increase; that they continued in the possession of the negroes, or their increase, till the death of John Hampton, that they then came into the possession of Joice Hampton, who sold Rose and Mary, two of the descendants of Hannah, to defendant, in the year 1838, who has held possession of the same ever since. Defendant is the brother-in-law of plaintiff, having married one of the daughters of said John and Joice Hampton. Joice Hampton died in 1852, and plaintiff demanded the said slaves and their increase from defendant, who refused to deliver them up, but claimed the same as his absolute property, under his purchase, for a valuable consideration from Mrs

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Joice Hampton, as above stated. Upon this refusal plaintiff instituted this action, for the recovery of said slaves.

At the trial, plaintiff tendered in evidence the three "memorandum of agreements" before mentioned, between William Malone and John Hampton, dated respectively 10th December, 1790, 27th October, 1797, and 23d December, 1807. To the introduction of which, counsel for defendant objected, on the ground, that there was no proof of their execution. Plaintiff, to obviate this objection, examined Nathaniel F. Legg, who testified, that he received these papers from James Hampton, who said that he received them from William Malone. Witness further stated, that on enquiry he heard that Daniel Johnson was dead, and he could hear nothing of John Henley; was acquainted with the hand writing of John Hampton, and believes the signature to said instruments to be in his hand writing; that he had searched at the house of Joice Hampton, and at Abda Shockly's, for a bond, said to have been given by James Hampton, relative to the negroes in dispute, and the interest which John and Joice Hampton had therein, but could not find it. Shockly told him that he had given it to defendant, and defendant gave it to Ira Bell, who returned it to Shockly, and that Shockly did not know where it was.

Defendant had been notified to produce said bond, but purged himself under the rule, by swearing that he did not have it.

Upon this proof, the Court admitted the papers in evidence, and also the deed of gift from Malone to plaintiff, dated 14th December, 1811.

To which rulings defendant excepted.

A number of witnesses were then examined on both sides, whose testimony it is unnecessary to set out, as all the facts necessary to a full understanding of the case, are stated above, and in the opinion of this Court.

The Court charged the jury in reference to the bond, or conveyance of a life estate in said negroes, by James Hamp-

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ton to John and Joice Hampton, that as it expressed no consideration, the jury could use it for one purpose only, and that was as an acknowledgment of the parties of John and Joice Hampton's right to the property during their lives, so as to show at what time plaintiff's right of action accrued, and consequently at what time the statute of limitations commenced to run.

The jury found for the plaintiff eighteen hundred dollars for the negroes, to be discharged by the delivery of the negroes within sixty days, at Marietta, Georgia. Also \$576 00 for hire.

Whereupon, counsel for defendant moved for a new trial, upon the following grounds, viz:

1st, 2d, and 3d. Because the verdict was contrary to law, contrary to the evidence and the charge of the Court, and strongly and decidedly against the weight of the evidence.

4th. Because the Court erred in admitting in evidence, the instruments or "memorandums of agreements" between Malone and John Hampton, before referred to, without proof of their execution.

5th. Because the Court erred in admitting in evidence the deed of gift from Malone to James Hampton, the plaintiff, without proof of its execution.

6th. Because the Court erred in admitting evidence in reference to said bond, or conveyance from plaintiff to John and Joice Hampton, of a life estate in said slaves.

7th. Because the verdict was contrary to the charge of the Court, to the law and the evidence, and without evidence.

The Court refused the motion for a new trial, and defendant excepted.

BROWN & JORDAN, represented by HUGH BUCHANAN, for plaintiff in error.

IRWIN & LESTER, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We think the “memoranda” were sufficiently proven to be admitted in evidence, for aside from all the other proof, they were shown to be “ancient documents.” They were shown to have come from the proper custody—from William Malone, and they were shown to have been in existence more than forty years, and the possession of the negroes was in conformity with these “memoranda” for the same period. All this shows them to be ancient documents, not needing further proof.

[2.] We think the certificate of record was sufficient to carry the deed of gift to the jury. As early as 1755, provision was made by statute (see *Cobb's Dig.*, page 159) for recording all conveyances of real and personal property; and by subsequent statutes all such conveyances as are directed to be recorded, are to be admitted in evidence when they appear to have been recorded in conformity with law. This point was not urged in argument.

[3.] All of the other assignments of error resolve themselves into the single one, that the verdict is unsupported by the evidence. This being a case where the plaintiff must recover on proof of title in himself, and not on mere want of title in the defendant, it was argued that the title of these negroes was shown to be, not in James Hampton, but in John, his father; for that before John gave the “memoranda” acknowledging that he held them as a loan, they had already passed to him as a gift, by virtue of their having gone into his possession from his father-in-law. Admit it—yet if the negroes were his own, he could by virtue of his very dominion as owner *cease* to hold them as his own, and henceforth hold them as his father-in-law's. This is just what he did, and the agreement was binding. Whoever may have been the owner of the negroes before the execution of these “memoranda,” William Malone was the owner after-

wards, and he subsequently conveyed his title to James Hampton, the plaintiff.

[4.] It was also argued, that because the plaintiff claimed under a voluntary conveyance without valuable consideration, while the defendant claimed under a conveyance for value, although from a person who had no title, the plaintiff's title must yield to the defendant's. The first answer to this is, that the evidence furnishes strong reason for believing that the defendant, though a purchaser for value, had notice—a circumstance which deprives him of all advantage in his conflict with the mere donee. In the next place, the doctrine of preferring a title founded on valuable consideration, over an older one without such foundation, applies only to a case where the conflicting titles are derived from the *same grantor*. It does not mean that the purchaser from one who never had any title, is to be preferred over a donee who has a gift from him who held the true title; for this would be in effect to deprive the owner of the power of making a valid gift of his property. The doctrine is, that in a conflict between two titles emanating from the same source, the one being a gift and the other a purchase for value without notice of the other, the purchase shall prevail, although it be subsequent to the gift. In this case, the donee claims from Malone, and the purchaser from Joice Hampton, and she claimed from nobody, except for her own life. The title here in contest is to the estate which was left after her death.

[5.] Again, it was argued, that according to the evidence, the plaintiff did not relieve himself from the statute of limitations, the bar being *prima facie* shown by the adverse possession of the defendant for fourteen years. We think he did relieve himself from that *prima facie* case, by showing that he had conveyed his title to Joice Hampton for her life, which lasted till 1852. This then, was the time when *his cause of action arose*, and it was within the four years next before the commencement of the action. It was said,

I remember, that this conveyance to his mother for life, was by *bond*, and that a bond cannot operate as a conveyance. The paper was sworn to be lost, and the witnesses testified as to what it contained. They said it conveyed an estate for life. It is a transparent fallacy to argue its contents from its *name*; its proper name depends upon its contents, and these are given by the witnesses.

Judgment affirmed.

ADAM B. DULIN, plaintiff in error, vs. R. & I. CALDWELL & Co., defendants in error.

- [1.] An award will not be set aside on account of newly discovered testimony, when the party has shown no diligence to obtain it.
- [2.] A case pending in Court may, by the agreement of the parties, be arbitrated under the Act of 1856.
- [3.] An award, under the Act of 1856, can only be impeached for fraud and corruption in the arbitrators.
- [1.] When a bill is presented for sanction, it is not a sufficient ground for refusing it that the same matter has already been passed upon in another case between the same parties.

In Equity, from Spalding county. Decision at chambers, by Judge CABANISS, 14th June, 1859.

Adam B. Dulin presented to Judge CABANISS, at chambers, for his sanction, and *fiat* for an injunction, his bill in equity, against R. & I. Caldwell & Co, it being a supplemental bill for relief, discovery and injunction.

The Judge refused to sanction the bill, on the ground that the matters therein contained and set forth, had been adjudicated; and on the further ground, that a bill iden-

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tically the same as the one presented had been before presented to him for his sanction and refused, and exceptions taken to said decision, and a bill of exceptions signed and certified and now pending and undetermined, to correct and revise said decision.

To which decision of the Chancellor, refusing his sanction to this last bill, complainant excepts, and assigns the same as error.

HAMMOND & SON, for plaintiff in error.

GIBSON ; and PEEPLES & CABANISS, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

It is only necessary to state, to make our judgment in this case intelligible, that a somewhat protracted litigation had taken place between the parties when it was agreed to arbitrate the matters in dispute between them. The submission was made under the Act of 1856, and was to be governed by it in all respects.

An award was made and returned by the arbitrators, and when it was moved to make it the judgment of the Court, Mr. Dulin resisted the application. His objections being overruled he applied for a bill of injunction, which was refused by the Court, and this refusal was brought up by writ of error to this Court and affirmed. Another bill of injunction has since been presented and refused, and a bill of exceptions being presented was signed and certified by Judge CABANISS.

Again, another bill was tendered praying an injunction, which the Judge refused to sanction, upon the ground that it contained matter which had already been adjudicated; and for the further reason, that he had signed and certified a bill of exceptions upon his former refusal, which was still pending and undisposed of. I would remark, that

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there is no record of the former bill, or of the writ of error.

Was the Court right for refusing its sanction to the last bill, and for not certifying a bill of exceptions? We think not, for the reasons assigned by him. It was his duty to sanction the bill, if it had equity, and leave it to the opposite party to plead a former recovery, provided the facts warranted it, or to have refused his sanction for want of equity in the bill.

Did the bill contain any equity? One of the items of indebtedness claimed of Caldwell & Co., by Mr. Dulin, was his moiety of the commissions on two thousand bags of cotton sold in Charleston. On the arbitration he offered no proof in support of this item. The defendants proved by a Mr. Neely, that commissions were not uniform in Charleston; that some times 25 cents on the bale was charged; at others 50 cents; and on some instances $2\frac{1}{2}$ per cent. commissions on the value of the cotton. The arbitrators adopted the medium rate of 50 cents on the bag, and allowed Mr. Dulin one-half of the amount, or five hundred dollars.

He now charges, as newly discovered evidence, that he can prove by several witnesses, naming them, and others in Charleston, that $2\frac{1}{2}$ per cent was the usual charge in that place. Has not Mr. Dulin been greatly wanting in diligence, in not procuring this testimony before? He was bound to furnish proof upon this point; it was a material part of his claim. He had ample time to obtain it. It would naturally occur to any business man, and such Mr. Dulin was, to apply to those engaged in the cotton trade to get it, and he could hardly have gone amiss on Bay street for this purpose. It would be most extraordinary and unprecedented indulgence to allow this award to be attacked on this ground, at this late day, and after all that has transpired in this case.

But there is an unanswerable reason why this bill should not have been sanctioned. It will be recollected that by the terms of the submission, the arbitration was to be governed

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"in all respects" by the Act of 1856; and notwithstanding that statute is applicable, only by its very terms, to controversies originating out of Court, still parties may, by agreement, in referring pending suits, adopt the provisions of that Act as the law of the proceeding. They did so in this case.

Now an award made under this Act can only be impeached for fraud or corruption in the arbitrators. This application is founded upon no such complaint. The award is therefore conclusive, notwithstanding any mistake, either in law or fact, in the finding by the arbitrators or even fraud in the parties. One averment only can be averred against the award, and that is a suggestion on oath, at the term to which the award is returned, that the arbitrators, or some of them, have been guilty of fraud and corruption in making the award.

And for these reasons we affirm the judgment of the Court refusing to sanction the bill.

Judgment affirmed.

ALFRED T. SMITH, plaintiff in error, vs. JAMES M. SMITH,
defendant in error.

That there is a mere preponderance of evidence against the verdict, is not sufficient to authorize the granting of a new trial.

Action on sealed note, and motion for a new trial. Tried before Judge Crook, in Chattooga Superior Court, March Term, 1859.

This was an action by Alfred T. Smith, against James M. Smith, on a sealed note, dated 13th day of June, 1832, pay-

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able one day after date to John W. Smith, or bearer, for one hundred and fifty-seven dollars. On the note was endorsed the following credit: "I received on the within note 23 dollars and 75 cents, this the 29th October, 1851."

Defendant pleaded *non est factum*.

Plaintiff proved by W. H. Smith, that he made the credit on the note, and it was made by the direction of defendant. The credit was made under the following circumstances: Witness's father held a forty dollar note on defendant, and bought a horse from him and gave him up the forty dollar note, and placed the balance agreed to be paid for the horse as a credit on the note sued on. The credit was entered at the time it purports to bear date. He handed the note to to defendant at the time he placed the credit on it, and defendant said it was all right.

Plaintiff then offered and read in evidence the note, and closed.

On the part of defendant, the following letter, written by plaintiff to defendant, was offered in evidence, to the introduction of which plaintiff objected. The Court overruled the objection, and plaintiff excepted.

"RESACA, January 15th, 1855.

UNCLE JIM:

Since I came home I have made general inquiry about the Roberson notes, and I find I will be able to prove that father had the note, but gave it back to you, stating he had no use for it, and you took it, and also that you agreed to the credit on the note that I sued you on. Now it is contrary to my feelings to join issue with you any further, and will propose to you this: If you will pay the costs, which is only five or six dollars, I will dismiss the suit. I propose this from this fact, I do not wish to join in law with relations; therefore, if you are willing to act upon this principle, let me know by letter as soon as you receive these lines, for I can save trouble by taking out interrogatories. It is just

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with you now to say what shall be done. Our folks are well, &c.

Yours truly,

A. T. SMITH.

Defendant then offered and read in evidence, another letter from plaintiff, dated Resaca, 10th June, 1856, informing defendant that he would be able to prove that the credit was entered on the note in his presence, and with his approval, assuring him that he wanted no advantage, and asking him to come up, and he thought they could fix it up, &c.

Defendant further proved by several witnesses that they were acquainted with his handwriting, and did not think that the signature to the note sued on was his. He also proved by the Clerk of the Superior Court of Chattooga county, that after the suit was brought defendant came to him and showed him a letter from plaintiff, in which he proposed to dismiss said suit against defendant, if he would pay the cost; and that defendant proposed to pay him (witness) the cost, which he declined to receive; did not feel authorized to dispose of the case without consulting plaintiff's attorney.

The testimony here closed, and the presiding Judge charged the jury, "that the plea of *non est factum* was a part of the pleadings, and that that plea merely put the plaintiff upon proof of the note sued on. The law did not require him to prove its execution by one who witnessed its execution, as the only method of proving it, but that this was only one way to prove it, and it might be proved by any other evidence which would satisfy them that the defendant executed it or recognized it as his own, as by an acknowledgement; and if they believed defendant executed the note, or recognized it, that was sufficient to charge him; but if they did not believe that he executed or recognized it, or if it had been altered in a material part, and the seal or date was a material part, without defendant's consent, then they should find for the defendant." And in reference

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to the proposition to settle the case, the Court charged the jury, that if the plaintiff proposed to settle or dismiss the suit upon the payment of the cost by the defendant, who accepted the offer within the time limited by plaintiff, and notified him of said acceptance, and tendered the amount of the cost they might find for the defendant; and if no time was named within which the proposition was to be accepted, then if defendant accepted it within a reasonable time, it is sufficient; but if defendant failed to accept the proposition as aforesaid, they should find for plaintiff.

The jury found for the defendant. Whereupon the plaintiff's counsel moved for a new trial, upon the grounds, that the verdict was contrary to the charge of the Court—contrary to the evidence, and to the law; and because the Court erred in admitting in evidence the letter above stated, and in the latter portion of the charge above stated.

The Court refused the motion for a new trial, and counsel for plaintiff excepted, and assigns said refusal as error.

DABNEY, for plaintiff in error.

SHROPSHIRE, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in refusing the motion for a new trial? We think so.

The main ground of the motion, urged here, was, the ground, that the verdict was contrary to the evidence. The issue was on the plea of *non est factum*. The verdict was in favor of the plea. The question on this ground, therefore, is, was the "weight of the evidence decidedly and strongly" against the plea?

The whole evidence against the plea consisted in the testimony of one witness, on one matter—consisted in the testimony of W. H. Smith, on the matter of the credit

entered on the note. His testimony was sufficiently positive, on that matter; it was, that he himself made the credit, and made it, by the direction of the defendant. And if this was true, if the defendant did make a payment on the note it authorizes a strong inference that the note was his.

But this testimony is greatly weakened by several things. 1st. The note was a sealed note, and the credit, which was for only two or three dollars, was entered just before the time at which the note would go out of date, as if, merely, to save it from going out of date. 2d. The witness was the brother of the plaintiff. 3d. Not only so; the note, probably belonged to the estate of the witness's father, and, therefore, was a note in which he, as heir to his father, had an interest. 4th. The letters show, that the defendant disputed the credit. 5th. They also show, that the plaintiff was willing to abandon the note, if the defendant would pay the costs of the action, which costs did not amount to more than \$5 00 or \$6 00. 6th. Five witnesses swore, that they did not think the signature that of the defendant. True this testimony was not worth a great deal, for the time when those witnesses saw the defendant write, was many years before the time when they testified. But then, *per contra*, the time when the note bore date, was many years before the time when they testified.

Now we think that, all of these things considered, the evidence for the plea, almost, if not quite, balances the evidence against the plea. And if the evidence did this, it is not true, that the weight of the evidence, was strongly and decidedly against the plea. And, consequently, it is not true, that the weight of the evidence, was strongly and decidedly against the verdict.

This ground involves all of the grounds except two. Of *those two*, the one was the admission of the letters of the plaintiff, to the defendant; the other, the charge, that if the plaintiff offered to settle or dismiss the case, on the defen-

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dant paying the costs, and the defendant accepted the offer, and duly tendered the costs, the plaintiff was bound by his offer, and the jury ought to find for the defendant.

That the letters were admissible, is clear, if proof about the compromise was admissible. Was proof about that admissible, seeing, that there had been no performance of what, by the compromise, the defendant was to do; viz: pay the costs, but only an offer to perform? And this resolves itself into the question, was the charge as to the compromise right?

We have much doubt on this point. But we rather think, that as the case stood, the charge was allowable. As the case stood, the presumption was, that the note was not the note of the defendant, for the case stood with a plea of *non est factum* in. If it was not his note, his liability for the costs, was only secondary, only conditional—depending on whether the plaintiff should be able to pay them or not, whilst the liability of the plaintiff to pay them was primary and absolute. Therefore, a promise by the defendant to pay the costs was, on the presumption aforesaid, a thing of value to the plaintiff; it was a promise to pay what, otherwise, he would have had to pay, and to pay as his own debt; and being of value to him, it was a sufficient consideration, to support his promise to dismiss or abandon, the action. We rather think, then, that the charge, which in effect held the compromise to be binding, though there had been no payment of the costs, but only an offer to pay them, was not erroneous.

But still we have great doubt on this point—doubt whether in such a case, any thing short of actual performance of the promise, will do. The point was barely mentioned; it was not argued.

Judgment affirmed.

THOMAS U. WILKES, plaintiff in error, vs. J. H. McCLUNG & Co., defendants in error.

[1.] A party to a suit, is incompetent as a witness, for his co-party, as long as he remains liable for the costs.

[2.] A minor child off at school, contracted an account with merchants, which his father paid. The next year the child contracted another account with the same merchants, which the father refused to pay. The first year, and also the second, the father caused the merchants to be notified, that they were not to sell the son any goods, without instructions from the man with whom the son was boarding. There was no evidence, as to the amount and items, of the second account.

Held, That the father's paying the first year's account, was not a fact from which it would be allowable to infer, that he authorized the contracting of the second year's account.

Complaint, on account, in Fulton Superior Court. Tried before Judge BULL, April Term, 1859.

This was an action by J. H. McClung & Co., merchants, against Thomas U. Wilkes, to recover the sum of \$63 20, on account of goods, wares and merchandise, sold and delivered to defendant's son during the year 1856. Thomas U. Wilkes, the defendant, was charged with the goods.

At the trial *R. F. Hutchins's* depositions were read, who proved that he was a clerk for plaintiffs. The goods were sold to defendant's son, and charged to defendant by his son's direction. The account was made in 1856.

George R. Ward deposed, that he was engaged in the dry goods with J. H. McClung, as a partner, but was not now interested, and had no interest in the account sued on. The goods were sold to defendant's son, and were charged to defendant by direction of his son. The last account, the one sued on, was made in the year 1856.

Plaintiffs further proved, that the account of the previous year, contracted by this same son, amounting to about seventy dollars, had been paid by defendant, without objection to complaint. The goods were sold at Rome, Georgia; defendant lived in Atlanta, and his son (Thomas) resided at Cave.

Spring, and boarded there with Carter Sparks, whose residence was sixteen miles from Rome; the son was between fifteen and sixteen years of age, and was going to school at Cave Spring.

Defendant's counsel objected to the testimony of Ward, on the ground, that he was a party plaintiff, and incompetent. The Court overruled the objection, and defendant excepted.

Defendant also objected to the proof, as irrelevant, that defendant paid the account contracted by his son in 1855. The Court overruled the objection, and defendant excepted.

The Court, at the conclusion of the testimony, charged the jury, that if the defendant's son made an account with plaintiffs the previous year, (1855) which defendant paid without objection or disapprobation, the plaintiff had the right to infer, that the goods were bought with the approbation of the defendant, and if he did not intend in future, to be bound, he should have given notice to plaintiffs; that the payment of the account of 1855, was a ratification of the son's authority to contract it, and from which plaintiffs had the right to presume a continuance of the authority.

To which charge counsel for the plaintiffs excepted.

Counsel for defendant requested the Court to charge the jury, that plaintiffs were not entitled to recover, as the goods furnished were not necessities. The Court refused so to charge, having previously charged that plaintiffs were not entitled to a recovery, on the ground that the goods sold were necessities—there being no evidence that they were necessities. To which counsel for defendant excepted.

The jury found for the plaintiffs the amount of the account sued on. Whereupon, defendant moved for a new trial, on the grounds, that the Court erred in the rulings, charges and refusals to charge above stated and excepted to, and because the verdict was contrary to law and the evidence.

The Court refused to grant a new trial, and defendant excepted, and assigned said refusal as error.

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GARTRELL & HILL, for plaintiffs in error.

GLENN & COOPER, *contra*.

By the Court.—BENNING J. delivering the opinion.

The question is, ought this Court to grant a new trial in this case? And, we think, that it ought.

[1.] The objection to Ward, as a witness was good. When his interrogatories were taken, he was still liable for the costs; nothing had then been done, to indemnify him against that liability, if, indeed, anything ever was done.

The objection to the charge, was also, as we think, good.

That a father pays one account contracted by his son, does not warrant the inference, that he authorized his son to contract another account. This certainly is true, unless the second account is similar, in amount and items, to the first. In the present case, there was no proof, as to the amount and items, of the first account.

Again; Carter W. Sparks, with whom the minor was boarding, (the minor being at school,) deposed as follows; "That he did receive verbal instructions from the defendant, the first year, and, written instructions, the second year, to the effect, that the merchants were not to sell the said Thomas G. Wilkes, any goods, without instructions from him—said instructions was duly communicated by me, to the merchants at Cave Spring."

Now in the face of such instructions as these, communicated to the merchants, would it be allowable to infer, that because the father paid the account of the first year, he authorized the contracting of the account of the second year? Surely not. What more could he do—even supposing, that he had authorized the contracting of the first year's account, but wished not to authorize the contracting of any future account?

We think, then, that the charge was erroneous.

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In respect to the request to charge—we are not quite sure, that we understand the ground of the Court's refusal of that request. Therefore, so far as that point is concerned, we will merely refer to the case of *Brown & McCoy vs. Deloach*, decided at Macon, June, 1859.

It is unnecessary to consider the other grounds.

Judgment reversed and new trial granted.

WILEY POOL AND WIFE, plaintiffs in error, vs. RICHARD MORRIS, et al., defendants in error.

- [1.] The admissions of a life-tenant are not evidence against the remainderman; they are not privies in estate, a privy being a successor to the *same estate*, and not to a different estate in the same property.
- [2.] One of two joint complainants has a right under our statute to amend the bill by striking his name as complainant, and inserting it as defendant.
- [3.] One estate can not be *merged* in another, unless both estates are owned by the same person in the *same right*.
- [4.] Men are to be presumed to intend that which they have the right and power to do, rather than what is beyond their right and power.

In Equity, in Henry Superior Court. Tried before Judge CABANISS, April Term, 1859.

This was a bill filed by Wiley Pool and his wife, Elizabeth, against Richard Morris, and Absalom R. Allen, seeking the partition of certain negroes, and to set up Mrs. Pool's equity in the share or interest coming to complainants.

The facts of the case are about as follows: In 1814, Absalom Ramey, and Daniel Ramey, of the county of Clark, executed their respective deeds of gift, conveying to Nancy

Allen, certain slaves for her life, and at her death remainder to her three children, Absalom R. Allen, Naomi Allen, and Elizabeth Allen, and to any other children she might have. Naomi intermarried with Richard Morris, one of the defendants, and Elizabeth intermarried with Wiley Pool, the complainant. Nancy Allen never had any other children, and she and her husband James Allen, retained the use and possession of the negroes and their increase till 1828, when the remaindermen all being of age, and Naomi and Elizabeth being married as aforesaid, said Nancy and her husband relinquished and surrendered their life estate in said negroes to Richard Morris, Wiley Pool and Absalom R. Allen, who had a division thereof, and each took possession of the share allotted or assigned to him, and entered into bonds, conditioned, to contribute and pay yearly a sum sufficient to maintain and support the said Nancy during her life. Upon this division Morris received four negroes, Pool three, and Absalom R. Allen two, and the difference in the value of these lots was equalized by the payment of money from one to the other. James Allen died about 1844, and Nancy Allen, the tenant for life, died in 1857. And this bill was filed by Pool and wife, alleging that the division made in 1828, was temporary and partial, and that it was the agreement and understanding of the parties, that at the death of the tenant for life, the said negroes and their increase in the hands of the respective remaindermen, were to be partitioned and a final and equal division then made. That said negroes and their increase now amounted to twenty-four, of which number Richard Morris had eighteen. The bill further alleged that Elizabeth Pool had nine children, and prayed that her share or interest of said negroes be settled on her and her children.

The defendant Morris answered the bill, and admitted the facts as therein stated, in relation to the deeds of gift from the Ramey's; and admitted that Nancy Allen and her husband relinquished their life estate in said negroes, and that there

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was a division thereof amongst the remaindermen in 1828, but denied that such division was temporary, but on the contrary, avers, that the same was final, and that each party received the share thus allotted and assigned, absolutely and unconditionally, and in fee simple, and took possession of the same. That he has held possession of the negroes set apart to him upon said division, and their increase, ever since, or has held, claimed and treated them as his own absolutely; and he denies that complainants have any right, title or claim, in or to the same or any part thereof.

Defendant Morris, further pleaded the statute of limitation and lapse of time.

Upon the trial, defendants, amongst other things, offered in evidence the bonds executed by Morris, Pool and Absalom R. Allen, conditioned, to maintain and support Nancy Allen during her life, as stated in the bill. Complainants objected to their introduction; the objection was overruled, and the bonds were admitted as part of the *res gestæ* at the division of the negroes, and complainants excepted.

Defendants next proposed to read the depositions of a number of witnesses, and to examine others, as to the sayings and declarations of James and Nancy Allen, in relation to their relinquishment of their life estate in said negroes. Complainants objected to said declarations. The Court overruled the objection, and admitted the evidence, and complainants excepted.

Defendants offered in evidence a bill of sale from Absalom R. Allen, to defendant Morris, for one of the negroes allotted to and received by him at the division. Complainants objected to its admission; the Court admitted it to the extent, that it might affect Absalom's interest. To which ruling complainant excepted.

Complainants during the trial, moved to amend their bill by striking therefrom, the name of Wiley Pool as complainant, and making him a party defendant, and to insert the

name of William W. Clarke as a complainant and next friend of Mrs. Pool. The Court refused to allow the amendment, and complainants excepted.

The Court charged the jury as follows:

"Absalom and Daniel Ramey conveyed certain negroes to Absalom R. Allen, Naomi and Elizabeth Allen, children of Nancy Allen, with a use for life to Nancy Allen, and at her death to be equally divided between her three children. The legal effect of the deeds was to convey a life estate in the property to Nancy Allen, with remainder to her children. This was a vested remainder. The title to the property vested in Absalom R., Naomi and Elizabeth Allen, upon the execution of the deeds by Absalom and Daniel Ramey, but the possession and use by them was postponed until the death of Nancy Allen. Then title was vested, and upon the marriage of Naomi and Elizabeth Allen, their interest in the property whatever it was, vested in their husbands, and their husbands by marriage, acquired the right to reduce their shares of the property into possession upon the termination of the estate of the life-tenant, subject to their equity to have their shares settled to their separate use. Nancy Allen having a life estate in the property, had the right by herself or by her husband to relinquish it to those who were entitled to the remainder, and if the relinquishment was made by her husband, and she gave her assent to it, and ratified it by accepting and carrying out the terms of the agreement, it became hers, and was as valid as if made by her. When that relinquishment was made, the life estate of Nancy Allen was extinguished; it became extinct, by uniting with and merging in the estate in remainder; and the life estate of Nancy Allen being extinguished, the estate of the remaindermen became absolute and unconditional. They then had the right to reduce the property into possession, and to divide it, either temporarily or permanently, as they might deem proper.

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If they proceeded to reduce the property into possession, and to make a final division of it, then was the time for the wife of Pool to assert her equity and her right to a separate settlement of her share. If she permitted a permanent division of the property to be made, and her share to go into the possession of her husband, without setting up or asserting her equity, she is barred from setting it up afterwards. When the life estate of Nancy Allen was extinguished by merging in the estate in remainder, Wiley Pool and wife had the right to reduce her share into possession. The only restriction to which that right was subject was a right on her part to set up her equity to her share, before her husband reduced it into possession; but if she permitted it to go into his possession without asserting her equity, her right to have it settled to her separate use is lost. When the life estate of Nancy Allen was relinquished to the remaindermen, their estate became absolute, and they could make such division of the negroes as they saw proper, and if the division then made, was merely temporary, with an understanding that a final and permanent division was to be made at the death of Nancy Allen, such temporary division did not vest a title to any specific portion of the negroes in either of the children of Nancy Allen; upon such division there was not such a reduction into possession, as to vest a title in Absalom R. Allen, Wiley Pool and Richard Morris, to the negroes respectively assigned them. If that was the division then made by the parties, Elizabeth Pool, upon the death of Nancy Allen, has the right to have a final and permanent division of the negroes, made according to the terms of the deeds of Absalom and Daniel Ramey; and Wiley Pool, the husband of Elizabeth Pool, never having reduced her share of the negroes into possession, her equity attaches to her share, and upon the partition which may be decreed, she has the right to have her share settled to her separate use, and the use and benefit of her children, free from the control of her husband and from any liability for his debts, and such division must

include all the negroes and their increase and profit; the negroes received by Pool and Absalom Allen as well as those received by Morris.

But if, when the life estate of Nancy Allen was relinquished to her children, they were all of age and competent to act for themselves, and if they then agreed to make a final and permanent division of the negroes, and did make such division by agreement among themselves, they are now concluded by that division and must abide by it. Such division vested a perfect title in them to their respective shares; and the jury should not decree any farther division, and when that division was made, and the shares of each were taken possession of by them respectively, that was such a reduction into possession by Wiley Pool of his wife's share, as to bar her equity and her right to have her share settled upon her, and that division also vested a complete title in Absalom Allen and Richard Morris to their respective shares. If therefore you believe from the testimony that such final and permanent division was made by the parties, you should find for the defendants."

Counsel for complainant request the Court to charge:

1st. That the equity of Elizabeth Pool cannot be barred by any act of her husband, without her consent and approval.

2d. That the Ramey deeds conveyed such an interest to Elizabeth Pool in the property, that no reduction into possession by her husband pending the life estate, or during the life of the tenant for life, could bar her equity.

3d. That by the terms of the deeds, the interest conveyed to Elizabeth Pool could not vest in possession until the death of Nancy Allen, and that any act, agreement or contract of her husband, by which the use for life of Nancy Allen was affected or destroyed, could not bar the wife's equity in the remainder vested by the deeds.

4th. That if the jury should believe, that Pool, Morris

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and Allen, purchased the life estate of Nancy Allen, and divided the negroes, that such division referred only to the life estate, unless it was then and there agreed that the remainder as well as the life estate should be divided, which must be expressly shown.

5th. If the jury should believe from the evidence, that Pool, Morris and Allen entered into an agreement with James and Nancy Allen, for the support of said Nancy for life, in consideration that the negroes should be given up to be divided, and bonds were given for her support by them, that this contract could not affect the equity of Elizabeth Pool in the remainder, unless it was expressly stipulated at the time that it should have this effect, and to which stipulation Elizabeth Pool gave her consent.

6th. That if the jury should believe that it was the contract between Pool, Morris and Allen, that they should take the negroes and divide, and in consideration therefor, gave their bonds for the support of Nancy Allen, this arrangement did not affect the wife's equity. To destroy the wife's equity, it must be shown that it was expressly agreed that the fee in the property should be divided, and to this agreement, Elizabeth Pool gave her assent, and that in the absence of such assent, the law would imply that only the life estate was divided.

7th. That if the division was evidenced by writings, such as bonds or other contracts, that such contracts could not bind Elizabeth Pool, unless she joined in them and was a party thereto.

8th. That the admissions of Wiley Pool, made after 1828, are no evidence of the nature or terms of the division. The admission of Pool, that he had done an act which would destroy the wife's equity, cannot be evidence against the wife that the act was done; the act must be proved, not Pool's admission of the act.

9th. That if the jury should believe from the evidence,

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that the division had reference only to the life estate, then the wife's equity is not destroyed.

10th. That if it be true from the facts in this case, that the life interest merged in the husband of the remaindermen, (notwithstanding the intervention of the wife's equity,) yet the merger can only affect the negroes in the possession of Pool, and cannot affect those in the possession of Morris and Allen, and which never came into the possession of Pool.

All of which the Court refused to charge, except the ninth request. To which charge and refusal to charge, complainants except.

The jury found for the defendant. Whereupon, counsel for complainants tender their bill of exceptions, and assign as error, the rulings, decisions, charges and refusals to charge above stated and excepted to.

CLARKE & LAMAR; and JNO. J. FLOYD, for plaintiffs in error.

PEEPLS & CABANISS, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We think the presiding Judge erred in admitting against Wiley Pool and his wife, the sayings of James and Nancy Allen, uttered at any time, except at the division of the negroes. What they said at that time, or what any body else said then, was part of the *res gestæ*, and would be admissible as such. But what they said either before or afterwards, is, as to Pool and wife, mere hearsay. True, they were life-tenants, and Pool and wife were remainder in the same negroes, but they were not *privies* with Pool and wife, and therefore their admissions are not evidence against Pool and wife. The rule is, that admissions are evidence against the parties who make them and their *privies*. This evidence was admitted upon the idea that Pool and wife were *privies*

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in estate to Allen and wife. Not so. A privy in estate is a successor to the *same estate*, not to a different estate in the same property. In this case, the *estate* of Allen and wife was during Mrs. Allen's life, and the *estate* of Pool and wife did not commence till the other was ended.

[2.] We think there was error also, in refusing to allow Pool to amend his bill, by striking his name as complainant and inserting it as defendant. The amendment Act of 1853 and 1854, is surely broad enough to include this case.

[3.] We think there was also error in the charge, that when Pool and Morris, the husbands of the two women entitled in remainder, and young Allen, the other remainderman, bought out the life estate of Nancy Allen, that life estate became *merged* in the remainder. Before a *merger* of one estate into another can take place, both estates must be owned, not only by the same person, but in the *same right*. Here Pool and Morris owned the life estate of Nancy Allen in their *own right*, for *they* bought it, but they owned the remainders of their wives in *right* of their *wives*.

But we consider both of the last mentioned errors to be very immaterial in the view we take of this case. The proposed amendment aimed to abandon Pool's claim for a new division of the negroes, and to rely solely on the wife's equity, while we think that in any one of the state of facts claimed as existing in this case, the wife's equity is gone, and the only case which the complainants can maintain is Pool's claim for the new division. Hence also, the question of *merger*, is immaterial, for it applies only to the wife's equity, which we think is effectually controlled by other principles. If there has been *no* division, the wife's equity is gone, for the life-tenant, Mrs. Allen, is confessedly dead, and all of the negroes were in the possession of Pool and Morris, a part in Pool's and a part in Morris's possession, before this bill was brought. But Pool and Morris, in right of their wives, are *joint* tenants of the remainder, and the possession of one joint tenant is the possession of all. The negroes in

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possession of Pool after his *right* of possession had accrued in remainder, as it did immediately upon the death of the life-tenant, were in possession of *all* the joint tenants in remainder; and those in possession of Morris were in possession of all, that is to say, in possession of Pool. Pool then, was in possession of all the negroes, and the possession and *right* of possession, being united in the husband, his estate became perfect, exempt from the wife's equity. The union of possession and the right of possession in the husband, always bars the wife's equity. But again, suppose there was a division of the life estate only, as the complainants contend was the fact. Then the same consequence follows. When Mrs. Allen died, all the negroes were in possession of Pool, either in his own person or through his joint tenant Morris, and the *right* of possession to the remainder at that time, also fell to him, and the same union as before, taking place, the same consequence follows. Again, suppose the division included both life estate and remainder, as the defendant contends was the fact, and the same effect is produced on the wife's equity. In this case, Morris was not holding the negroes as joint tenant when Mrs. Allen died, but was holding as his own in severalty. But he was holding under a conveyance from Pool, for the division, if it included the remainder, amounted to a conveyance to Morris of Mrs. Pool's estate in those negroes which were assigned to Morris. It was a conveyance which *Pool* could never recall; it effectually carried *his* interest from the first. Then at the death of Mrs. Allen, Morris stood clothed with *Pool's right* of possession, and he had the actual possession in his own person. Again therefore, the possession and the right of possession were united in the same person; not in the husband, to be sure, but in one who derived his right from the husband. *The husband's act* united the two things in another person. *This* union, whether it takes place in his own person or in the person of another, is equally effectual to bar the wife's equity. This is obvious from a consideration of what that

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equity is, and in what cases it can be asserted. It is only in cases where the estate cannot be reduced to possession of the husband or his assignee, without the aid of a Court of Chancery. When the husband or his assignee applies to the Court for the enforcement of his rights, the Court compels him to make an equitable settlement before it lends him its aid. The jurisdiction has been extended, so that the wife herself may move in the matter, whether the husband moves or not; but she can get the remedy only in cases where the husband would be obliged to resort to the Court to enforce his rights, if they are resisted. That is to say, she can never assert her equity in cases where the husband or his assignee already have the possession, and the right of possession, and where consequently there can be no possible occasion to resort to the Court in order to have anything further done. The death of the life-tenant was the time when the wife's equity was lost in each of these supposed cases.

[4.] The only remaining question is one on which the whole case turns. We think it was error in the Judge to refuse to charge as requested by complainant, that the division which was made by Pool and Morris and young Allen, in the lifetime of Mrs. Allen, must be presumed to have included only the life estate which they had the power to divide with completeness and finality at that time, and not the remainder which they had no power so to divide before the death of Mrs. Allen. The division was of course meant to be a *complete* one of *whatever* was divided, unless the contrary appears. The life estate could have been completely divided at that time, nothing else being necessary to render it perfect, but the remainder could *not* have been so divided at that time, for *that* division could not be complete till the death of Mrs. Allen, since up to that event, either of the wives could have disturbed it, by asserting her equity. It is a rational presumption, that men *intend* to do that which they have a right and power to do, rather than what

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is beyond their right or power. This presumption must prevail till rebutted by affirmative contrary evidence.

These principles dispose of all the questions raised by the bill of exceptions.

Judgment reversed.

JAMES M. BLEDSOE, plaintiff in error, vs. NATHANIEL M. BLEDSOE, and others, defendants in error.

Where property left by a testator to his children, has been fraudulently disposed of, by collusion, between the executrix and the purchaser, the legatees may file a bill in their own name, against the purchaser, the executrix having died insolvent, and there being no representative upon her estate, or the estate of the testator.

In Equity, in Butts Superior Court. Decision on demurrer, by Judge CABANISS, September Term, 1858.

This was a bill filed by Nathaniel M. Bledsoe and others, children and grand-children of Morton Bledsoe, deceased, against James M. Bledsoe, and Jesse W. Wilson.

The bill states, that Morton Bledsoe departed this life in September, 1845, leaving his last will and testament, in and by which, he appointed his wife, Mary Bledsoe, executrix, during her life or widowhood, who qualified as executrix thereof, and possessed herself of the whole estate, real and personal of deceased, of the value of twenty thousand dollars or other large sum. That by said will, testator devised and bequeathed his whole estate to his wife, the said Mary, in trust, to be by her worked and managed for the use, education and maintenance of herself and of such of his male

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children as he might leave under age, and of such of his female children as he might leave unmarried, during their minority, and her natural life or widowhood, and until his female children should marry; and further authorizing his widow to sell and dispose of so much or such parts of his estate as she might think necessary to pay debts, &c.

Said will further directed, that in the event of the marriage of his wife, all the powers vested in her as executrix and trustee, should cease and determine, and that Elijah Bailey, and James M. Bledsoe, testator's son, should succeed her, as executors and trustees; provided that all testator's children should not at the time of her marriage, have attained the age of fifteen years, and that his estate be kept together until the youngest child attain the age of fifteen years, and then the whole to be equally divided between his wife and children, share and share alike forever. By the third clause of the will testator directed, that in the event of the death of his wife, Elijah Baily and James M. Bledsoe should succeed as his executors, and divide out his estate amongst his children, as before provided, when the youngest should attain to the age of fifteen years.

The bill further alleged, that testator, in his lifetime, executed a mortgage of fourteen hundred acres of land and eighteen negroes, with their increase, to one Charles Bailey and Gustavus Hendrick, to indemnify them as his sureties on two promissory notes, payable to one Anthony Dyer, for four thousand seven hundred and fifty dollars; that some payments were made by testator on these notes, in his lifetime, and at his death, there remained due on said notes, between three and four thousand dollars.

The bill further states, that testator before his death executed a note with security thereto, for the purpose of borrowing or raising money to pay off the balance of said mortgage, but which note was not negotiated, nor the money raised thereon, until after testator's death, when the same was done by his son, the said James M. Bledsoe, who with the

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money thus raised, purchased and obtained the control of the mortgage, and the *fi. fa.* issued on the foreclosure thereof.

The bill further states, that the said Mary Bledsoe, executrix, at the suggestion and under the advice of the said James M., consented that the negroes should be sold under said mortgage *fi. fa.* for the purpose of protecting them from a security debt incurred by testator in his lifetime, the said James M. undertaking to purchase in said negroes for the benefit of herself and children, and to be held as under the provisions of said will; and that the said Mary, confiding in the integrity of the said James M., permitted said slaves to be sold, and the same were bid off by him at one-sixth of their value—he representing at the time, that he was buying them for the benefit of complainants, and procuring one Joseph Manly to put in or assert a pretensive claim to the same, and thus was enabled to bid off said negroes at a nominal price, and the amount of said sale was credited upon said mortgage *fi. fa.* After the sale, the negroes were returned to the plantation of testator, and the said James M. became the overseer on the premises for a year, and received the entire proceeds of the crop, amounting to some two thousand dollars.

The bill further alleges, that the said James M. and one Elijah Bailey, pretending to be acting for the benefit of the legatees under said will, persuaded and induced the said Mary, to permit a valuable tract of land belonging to said estate, and consisting of one thousand acres, to be sold under the encumbrance of said mortgage, promising that they would bid in the same, and return it to her as executrix, for the benefit of said legatees, and that said land was accordingly sold, and the same purchased by the said James M., at and for the sum of one hundred dollars, when the same was worth five thousand dollars.

The bill further alleges, that the said James M. and Elijah, by means of similar representations, induced said executrix to offer for sale another tract of land, containing three hun-

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dred acres, belonging to the estate of her testator, and by false and fraudulent statements and representations, said land was bid off by the said Elijah, at and for the sum of two hundred dollars, the same being worth two thousand dollars; that said Elijah was disposed to carry out said agreement in good faith, but before the same was done, he died, and his widow, who administered upon his estate, shortly thereafter intermarried with Jesse W. Wilson, of the county of Newton, and who is made a defendant to the bill.

The bill further states, that Mrs. Bledsoe being a woman, and but little accustomed to the transaction of business, and the said James M. being the oldest son of testator, she confided in his honesty and gave up to him the control and management of the estate; and that he, taking advantage of her misplaced confidence, and in violation of his promises and their agreements and understandings, claimed all said negroes, and land and money as his own, and took possession of the same, and since her death, which occurred in 1855, he has continued to hold, claim and use the same as his own individual and absolute property, denying the rights of complainants in and to the same or any part thereof.

The bill further alleges, that all the children are over the age of eighteen years, and complainants pray that defendants, James M. Bledsoe and Jesse W. Wilson, may answer all and singular the allegations and charges of the bill, and set forth a full and true account of all the property in their hands, belonging to said estate, and that they account for the whole of said property, its increase and profits, and pay over the same to complainants, or their respective shares thereof. The bill further prayed for the writ of *quia timet* against the said James M. and Jesse W., and for an injunction to restrain them from selling the lands purchased as aforesaid by them, and for discovery, relief, &c.

To this bill defendants demurred, on the ground, that defendants were not answerable or liable to be called to account by complainants, as the legatees in remainder of Morton

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Bledsoe, deceased, but only by an administrator, *de bonis non cum testamento annexo*, of Morton Bledsoe, deceased. And upon the further ground, that the Court had no jurisdiction as to Jesse W. Wilson, he not being a citizen of the county of Butts.

The Court overruled the demurrer, except as to Jesse W. Wilson, and as to him sustained it, upon the ground, of want of jurisdiction. To which decision, counsel for James M. Bledsoe excepted, and assign the same as error.

BAILEY, FLOYD; and DOYAL, for plaintiff in error.

PEEPLES, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Morton Bledsoe died in 1845, leaving a considerable estate, real and personal; a widow, whom he constituted his executrix, and fourteen children. By his will, his children were to be raised until the youngest male child attained the age of fifteen, at which time his property was to be distributed between them.

Being a debtor to one Dyer, with Gustavus Hendrick and Dr. Charles Bailey as his securities, he executed a mortgage to his securities, for their indemnity. He made some payments upon this debt in his lifetime; and had gone so far as to make a note to raise the balance of the money to pay this mortgage debt before he died. This note, however, was not negotiated, but was left in his possession at the time of his death. It is probable that James M. Bledsoe, the plaintiff in error, was security upon this paper, although the fact does not distinctly appear. After the death of Morton Bledsoe, the money was raised on this note by James M. Bledsoe, with which the mortgage was paid off and taken up.

It seems that the estate was under some other liability, actual or threatened, and James M. Bledsoe entered into an

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arrangement with Mary Bledsoe, the widow, and executrix, to sell the property in such a way as would cause it to bring little or nothing; it was to be bought in by James M. Bledsoe, and placed back into the possession of Mrs. Bledsoe, to carry out the purposes of the will; that is, to make distribution of it amongst the children.

The negroes were sold under the mortgage, taken up by James M. Bledsoe, and kept open by him, at a nominal price, and the proceeds credited on the mortgage; and two tracts of land were sold by the widow as executrix, for the benefit of the heirs, under the encumbrance of the mortgage; one of which was bid in by James M. Bledsoe; and the other by one Elijah Bailey, the brother-in-law of Morton Bledsoe, and who participated in carrying out the arrangement entered into by Mary Bledsoe, and James M. Bledsoe. The property was returned to Mrs. Bledsoe, and James M. Bledsoe overseed it the first year, at a salary of \$300. After this, James M. Bledsoe repudiated the whole transaction, setting up title in himself, both to the land and negroes.

Mary Bledsoe died in 1845, insolvent, and her estate is unrepresented; and the legatees have filed their bill against James M. Bledsoe, and one Wilson, who intermarried with the widow and only heir at law of Elijah Bailey, to recover the whole of the property except one share, with a view to its division amongst themselves, according to the will of their father. A general demurrer for want of equity, is filed to the bill; but the only ground relied on is, that the complainants are not entitled to sue for the property in their own name; and that it can only be recovered by an administrator, *de bonis non*, upon the estate of Morton Bledsoe.

Had the bill alleged, that there were no outstanding debts against the estate of Morton Bledsoe, there can be no doubt, we apprehend, but that the bill would be maintainable. How stands the matter upon the facts as stated in the bill? Ten years elapsed from the death of the testator to the death

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of the executrix. Had there been unpaid demands, it might be fairly inferred, that some attempt would have been made to enforce them within that time. But concede that there are debts still unsatisfied, will the defendant or creditors be prejudiced by this proceeding?

The defendant by his answer, can bring to the knowledge of the Court, outstanding claims, if there be any. And the decree will be so framed as to protect him. The creditors, if there be any, can sue James M. Bledsoe, as executor *de son tort*, interplead, pending the present proceeding; or failing to do either, they can follow, the estate, into the hands of the legatees, even after a division, and compel them to contribute to the payment of their demands.

Fourteen years have elapsed since the death of Morton Bledsoe; the youngest child is eighteen years old; the property was sold for the benefit of the complainants; the assent of the executrix to the vesting of these legacies, will be presumed from all the circumstances of this case. The whole transaction amounts to this. Surely the legatees are entitled to sue. Why not? The creditors have stood by all this time with their arms folded; they could have administered. If they should be put to some inconvenience, which there is no reason to apprehend, they would have no cause to complain.

Judgment affirmed.

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BENJAMIN WALKER, plaintiff in error, vs. **ISAAC SCOTT**, defendant in error.

DANIEL GRANT and **BENJAMIN WALKER**, plaintiffs in error,
vs. The same.

DANIEL GRANT, plaintiff in error, vs. The same.

[1.] Plaintiff's attorney endorsed upon the declaration in the Clerk's office, in vacation, the following entry: "I hereby discharge and dismiss the bail process, and bail sued out at the commencement of the action."

Held, That the effect of the entry, was to dismiss the bail process only, and not the suit upon which it was grafted.

[2.] Judgment is entered up against A. as principal, and B. as security on appeal; C. another security being, through inadvertence, omitted.

Held, That upon a motion to amend the judgment, so as to include C., A. the principal, was not entitled to notice.

In Upson Superior Court. Decision by Judge CABANISS,
at May Term, and May adjourned Term, 1859.

These three cases were heard and decided together.

The facts of the cases, are as follows:

In January, 1858, Isaac Scott, of the county of Bibb, instituted his action of assumpsit against James S. Walker, of the county of Upson, on a promissory note, for about nine thousand dollars, returnable to the February Term of the Inferior Court of said county. In this suit, plaintiff's attorney made and filed an affidavit for bail, and defendant was arrested by the Sheriff and executed the ordinary bail bond, conditioned for his appearance at the Term of the Court to which the writ was returnable, and which bond and process was returned to the Clerk's office, and the case entered on the appearance docket. Afterwards, and after the first, or appearance Term, on the 12th April, 1858, the plaintiff's attorney, finding, or conceiving, that said affidavit for bail was

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insufficient, made the following entry in the case, to-wit: "I hereby discharge and dismiss the bail process and bail, sued out in the within suit, and taken at the commencement of said suit. April 12th, 1858. James W. Greene, Plff's Att'y. Test: A. T. Shackelford." Said Shackelford was the Clerk of the Court. Immediately thereafter, on the same day, the attorney sued out bail process *pendente lite*, and caused the defendant again to be arrested. At the August Term of said Court, defendant confessed judgment, reserving the right of appeal, and Daniel Grant and Benjamin Walker became his sureties on the appeal bond. At November Term, 1858, of the Superior Court, defendant confessed judgment for the principal and interest due on said note, and cost of suit, and plaintiff's attorney entered up judgment against James S. Walker, the principal, and Daniel Grant, one of the sureties on the appeal, and issued an execution thereon, which was levied by the Sheriff on twelve negroes, the property of Grant.

The following is the note sued on, and upon which judgment was obtained, and execution issued, as above stated, to-wit:

"\$9,000. By the twenty-fifth day of December next, we, or either of us, promise to pay A. D. Abrahams or bearer, nine thousand dollars, for value received, with interest from date. This 15th day of May, 1857.

(Signed,) JAMES S. WALKER,
FREEMAN WALKER,

per. J S. WALKER, *Att'y.*

FRANCES COLEMAN, formerly

FRANCES WALKER, per J. S. WALKER, *Trustee.*

(Endorsed,) BENJAMIN WALKER."

It further appeared that Scott, the bearer and owner of said note, also brought suit against Benjamin Walker, endorser as above, returnable to the February Term, 1858, of Upson Inferior Court, and recovered judgment by confession, at the August Term thereafter, from which the said Benjamin appealed, and said Daniel Grant became his surety on said

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appeal; and afterwards, at the November Term, 1858, of the Superior Court of Upson county, defendant, Benjamin Walker, confessed judgment to plaintiff for the full amount of the principal and interest of said note and cost of suit, upon which judgment was entered and execution issued against the said Benjamin Walker, and Daniel Grant, his surety on said appeal, as provided by law.

Upon this state of facts, all the above cases originate and were adjudicated.

The first case, was illegality taken by Benjamin Walker, to the execution issued on the judgment recovered against him as above stated, upon the following grounds:

1st. Because the judgment on which said execution issued, was founded on a promissory note, of which defendant was accommodation endorser. That plaintiff likewise brought a separate suit against the principal to said note, James S. Walker, and recovered judgment thereon on the appeal, and entered judgment, and took out execution against said James S. Walker, and Daniel Grant, security on said appeal, and which has been levied upon a large number of Grant's negroes, and that the judgment and *fi. fa.* now proceeding against affiant are for the same debt.

2d. Because defendant is released from all liability, on said judgment and *fi. fa.*, on the ground, that being only an accommodation endorser, and plaintiff having sued the principal in a separate suit, and recovered judgment against said principal and his sureties on the appeal, failed to enter the proper and legal judgment therein, by omitting in said judgment one of said sureties, and thereby impairing the rights of defendant in the control of said judgment as endorser as aforesaid.

It was admitted that the party surety omitted in the plaintiff's judgment, was the defendant himself; it was also admitted that Daniel Grant had filed a bill in equity to enjoin the levy and sale of his property under said *fi. fa.*, and praying that said judgment be set aside and vacated. Plain-

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tiff introduced this bill and his answer thereto in evidence, and moved that the illegality be dismissed. The Court granted the motion and dismissed the illegality and counsel excepted.

The second case, was a rule *nisi*, taken out by Scott, in the case against James S. Walker, principal, and Daniel Grant and Benjamin Walker sureties on the appeal, calling on defendants to show cause why the said judgment should not be amended or a judgment *nunc pro tunc* should not be entered in favor of plaintiff against all of said defendants in said cause; the judgment and execution having only been entered and issued against James P. Walker, principal, and Grant, one of said sureties, by mistake of the attorney. At the hearing of this rule, counsel for Grant, and Benjamin Walker, objected to the motion, and all further proceedings against them, until James S. Walker was made a party by service or legal notice. The Court overruled the objection, and counsel for Daniel Grant and Benjamin Walker, excepted.

Defendants, Grant and Benjamin Walker, then demurred to the rule, on the ground, that plaintiff sought to quash a legal and binding judgment against James S. Walker and Grant, and to enter a judgment in the same cause, against said James S. Walker, Grant and Benjamin Walker, and thereby to alter and falsify the record. The Court overruled the demurrer and counsel excepted.

The Court then granted the motion to amend said judgment, by inserting therein the name of Benjamin Walker as surety on the appeal. To which decision and order, counsel for Grant and Benjamin Walker excepted.

The third case was, a bill filed by Daniel Grant to enjoin and restrain the Sheriff from proceeding to sell his negroes, levied on as above stated, and to annul, set aside and vacate the judgment aforesaid, against James S. Walker and him-

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sitting in equity, and Judge CABANISS presiding at common law. He has disposed of the controversy, as it would seem he might well do to his own satisfaction, and we see no reason for thrusting ourselves into it.

There is but a single question in all these cases, and it is this: does the dismissal of bail process carry out of Court the suit upon which it is grafted?

It is admitted, and correctly, that notwithstanding a suit is commenced by bail, if the bail process cannot be served, it may proceed as an ordinary action. This concedes the whole question. It establishes that the two are not inseparably connected, and this is further demonstrated from the fact, that bail process may be sued out *pendente lite*. And this not only answers the objection to the motion to amend the judgment, but disposes of the ground in the equity cause.

The only new point made in Grant's bill is, that Green, the attorney of Isaac Scott, had, for a consideration paid him by Benjamin Walker, agreed to collect the debt out of him: all of which is flatly denied.

I have not deemed it necessary or profitable, to notice in detail the many minor points made in this record; all of which we hold were properly disposed of by the Court below.

Judgment affirmed.

**SWEET WATER MANUFACTURING COMPANY, plaintiff in error,
vs. THOMAS C. GLOVER, defendant in error.**

- [1.] When one white man employs another to work for him, it is not an implication or incident that the employer shall pay the employee's physician's bills; it would require an express contract to create that obligation.
- [2.] No sayings of an agent are admissible against his principal, except what he says concerning his appointed business while he is doing it—*dum ferret opus*.

Certiorari, in Campbell Superior Court. Decision by Judge HAMMOND, April, 1859.

Thomas C. Glover, the defendant in error, a practicing physician, brought suit against the Sweet Water Manufacturing Company, the plaintiff in error, in a Justice Court, on an account for medical services rendered to an employee of said company.

It appeared, from the evidence, that William E. Gould was the superintendent of the working hands in said factory; that *Russel Paine*, one of the hands at work under Gould's superintendence, got his arm injured by the machinery; that doctor T. M. Howard was called in to see him; that it became necessary to amputate his arm, and doctor Howard requested the assistance of doctor Cochran, and doctor Glover, the defendant in error, and Mr. Gould sent for them; the operation was performed, and the patient, Paine, died in a few days thereafter. Glover sued the company for his services thus rendered, amounting to forty one-dollars.

Dr. Howard testified before the Justice Court, that when he was first called in, Gould told him to make his charge against the company, as it was bound to pay him, and not to charge anything to Paine. Upon the return of W. J. Russell, who was the principal agent of the company, he informed him of what Gould had said to him, and Russell made no express ratification or objection, and they continued their attention to the case.



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Upon objection to the sayings of Gould, until his authority was proved, *T. B. Bobo* was called as witness, who testified that the hands of the factory were under the control of Mr. Gould, and he acted as agent; that he bought cotton for the factory, &c. It was also proved, that in the absence of Russell, Gould had full authority to buy cotton; that at the time Paine was injured, and the physicians were called in, Russell was absent, and Gould seemed to be acting as agent, and controlling every thing about the factory. Upon this proof the Justice let in the sayings and declarations of Gould.

Joseph Paine, the father of Russell Paine, testified that his son was hurt by the machinery while working in the factory, and that he called in the store one day and wanted some articles, and Mr. Russell told him that he owed about seven dollars, and that the company had to pay his son's doctor's bill, and that he could get nothing more; that he had been discharged from the employment of the company, &c.

It was further proved, that Russell had given an order, which had been filled, for brandy for the patient, and had since agreed to pay it. This testimony was objected to as irrelevant. The objection was overruled, and the evidence let in for what it was worth.

G. T. Coval testified, that when Paine was employed he was warned of the danger of the wheel by which he was injured, and that Gould had nothing to do with the outside business of the factory.

J. L. Alden testified, that Russell was absent, but did not think that Gould had any power to send for a physician for the factory hands, and did not suppose that Governor McDonald would have, although he was head agent of the factory.

The jury found for the plaintiff the full amount of his account.

Whereupon defendant filed his exceptions, and brought

the case by certiorari to the Superior Court, alleging the following errors in the Justice Court:

1st. The admission of the sayings of Gould, who was not a party, nor the general agent of the company, but only in their employ as superintendent of the hands engaged in the factory.

2d. The admissions of the sayings of Russell, who was only general agent to transact business connected with the factory, and the employment of physicians being no part of said business.

3d. The admission of the order signed by Russell, agent, to furnish brandy to the patient.

The Court dismissed the certiorari and affirmed the judgment of the Justice Court.

To which decision, counsel for plaintiff in certiorari excepted.

STONE & FITCH; and EDGE, for plaintiff in error.

BUTT, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

The only question in this case is as to the legality of the evidence which was objected to, but admitted. We think it was clearly inadmissible. The Judge below puts its admission upon the ground, that it was as much within the business of the company to have its operatives repaired when injured at their work, as it is to have the machinery repaired when it is out of order. This would be the exact law of the case, if the company's operatives were its slaves, instead of being free white men and women. A master's business and duty is, to make his slave work, and then to furnish him all that is necessary for him. But when the relation of employer and employee exists between white people, the contract of the parties, is the standard of their duties. If

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one white man employs another white man to work for him, and *agrees* to pay his doctor bills, he is bound to pay them, and if he *don't* agree, he is *not* bound. In this case as in all others between white people, the question is, did the company *agree* with its operatives, to pay their physician's bills? If they did, then it was a part of the agent's business to send for a physician whenever an operative needed one, and it was the duty of the company to pay the bill. If they did not so agree, then they had no duty about it. When a white man engages to work for another, he undertakes to furnish the labor and to do all the repairs that are needful to keep up the supply of labor. This is the implication, and it would require an express contract to the contrary, to overcome it. Now to find out what the contract was, we must look to the contract itself. The only evidence offered concerning the contract, was the sayings or acts of divers of its agents, uttered and done, *long after the contract had been made*. There was some *gradation* of agents, made in the argument, but that is wholly immaterial. Neither Mr. Gould, nor Mr. Russell, nor Gov. McDonald, nor any other agent of the company, could say anything to bind them, except what he says about his appointed business, while he is doing it. It must be said about his appropriate work, and said *dum fervet opus*. Whatever was said while the contract was making, is evidence, but what was said about it afterwards was no better coming from an agent than from anybody else. The principle on which an agent's sayings are admitted against his principal at all, is, that they are part of the *res gestæ*.

Judgment reversed.

Jackson and wife vs. Coggin et al.

HARDY R. JACKSON, and WIFE, plaintiffs in error, vs. MATTHEW COGGIN, and others, defendants in error.

The ninth item of the will of John Coggin, deceased, was as follows: "I give to my daughter, Mary Scott, and her children, free from the disposition of any future husband, Anaky and her two children, viz: Floy and Martha; and Letty and her child Winny; and Minerva and Miles, and Rose and increase; and three hundred dollars in money or notes, at my death."

Held, That Mary Scott took, as joint tenant with her children, and not a life estate in the whole property.

In Equity, in Pike Superior Court. Decision on demurrer, by Judge CABANISS, at chambers, 27th June, 1859.

The ninth item of the will of John Coggin, deceased, was as follows:

"I give to my daughter, Mary Scott, and her children, free from the disposition of any future husband, Anaky, and her two children, viz: Floy and Martha; and Letty, and her child Winny, and Minerva and Miles, and Rose, and increase, and three hundred dollars in money or notes, at my death."

Mrs. Scott is living, and has nine children. The bill is filed by Hardy R. Jackson, (who intermarried with Nancy C. Scott, one of said children) and said Nancy C. his wife, against the executors of the will of John Coggin, deceased, and Mary Scott, for their share of the legacy contained in the foregoing item of said will.

To this bill defendants demurred, on the ground that said Mary, under and by said item of said will, takes an estate for life, remainder to her children at her death, and that complainants had no interest in said property till the termination of said life estate.

The Court sustained the demurrer, and dismissed complainants' bill; to which decision counsel for complainants except.

GREEN & STEWART, for plaintiffs in error.

H. GREEN; and GIBSON, contra.

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By the Court.—LUMPKIN J. delivering the opinion.

The only question in this case is, does Mary Scott, the daughter of testator, take a life estate in the property bequeathed in the ninth item of her father's will; or, does she take as joint tenant with her children?

There is no doubt, that according to the rule of the common law, as well as one of the resolutions in *Wild's* case, (6 *Coke*, 17 a.) the mother and the children take a joint estate, unless there are some words which show a manifest and certain intent in the will to the contrary. In this case, the only words relied on, are, that the property bequeathed is to be "free from the disposition of any future husband."

Now if the object of the testator was, to protect the property given to his daughter, from the marital rights of any future husband, these words would be just as necessary, if she took one share in fee, in the whole, or an estate for life in the whole; so that after a careful examination of all the cases, which will be found collected in *Roper on Legacies*, and *Jarman on Wills*, we have come to the conclusion, that these superadded words do not manifest such a certain intent to that effect as would require, or even justify the Court in raising a life estate in the daughter, by implication.

Our statute of distributions, puts the mother and children upon the same footing. Testators sometimes give a life estate in the whole property to the wife, with remainder to the children. We do not feel called on to strain the natural and plain meaning of words to carry this property contrary to the direction, which the statute would give it.

It is said that, should we hold this to be a joint tenancy, and a division should be made of this property at the death of the testator, that after-born children of the daughter, Mary Scott, would be excluded. We do not think so; but are inclined to hold that the contrary would be true, and suppose, that to avoid such a consequence, we were to hold, that the property did not vest till the death of Mary Scott,

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the mother; that after-born children might come in with those living at the death of the testator; and suppose some of these children should have children, and die; as, for instance, Mrs. Jackson, the complainant, who is a daughter of Mary Scott; the children of such child would be cut out, because they would not answer to the description of children at the time the gift took effect.

Better to hold then, that the gift takes effect immediately, subject to be reopened upon the birth of future children.

The case of *Oats ex dem., Hakerly vs. Jackson, 2 Strange 1172*, and the citation from *Coke on Littleton*, in that opinion, are direct and strong authorities in favor of the construction which we give to this will.

Judgment reversed

JEPHTHA LANDRUM, next friend, &c., plaintiff in error, vs.
WILLIAM J. RUSSELL, defendant in error.

It is error to charge the jury, that a deed of gift to a slave is superseded by a subsequent purchase from the same person, without notice of such deed of gift, in a case where there is no evidence of a purchase from the same person, and where the deed of gift had been recorded within twelve months after it was made—such record being equivalent to actual notice to the subsequent purchaser by our Act of 1838. See *Cobb's Digest*, page 176.

Trover, in Fayette Superior Court. Tried before Judge BULL, March Term, 1859.

This was an action of trover by William M. D. F. Elder, (by his next friend, Jephtha Landrum,) against William J. Russell, to recover a negro man named Ephraim.

It appeared that this negro originally belonged to Joshua

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Elder, who sold him to his brother, Sterling Elder, in 1843, and executed a bill of sale to him. Sterling, by deed of gift, dated 22d April, 1846, conveyed said negro to the plaintiff, an infant son of Joshua Elder. This deed was recorded 23d April, 1846; afterwards, about 1848, the negro, Ephraim, was sold at Sheriff sale, as the property of Joshua Elder, under a *fi. fa.* against him, of prior date, to the bill of sale, or deed of gift aforesaid. At this sale, Sterling Elder became the purchaser, and the negro went into the possession of Joshua Elder again. Subsequently, in 1853, the negro was again sold by the Sheriff, under a *fi. fa.* controlled by Sterling Elder, as the property of Joshua Elder, and purchased by Mary Nixon, and by her, afterwards, sold to William J. Russell, the defendant.

After the testimony had closed, which was voluminous, the Court charged the jury, amongst other things, that the title acquired by Sterling Elder at the Sheriff's sale, did not inure to the benefit of the plaintiff, to whom Sterling Elder had previously given the negro; that the Sheriff's sale in 1848, could not affect plaintiff's title in any way; for if title vested in him before that sale, the sale could not divest it; and if he had no title before that time, the Sheriff's sale could not enure to his benefit; that where a Sheriff levied an execution on personal property sufficient to satisfy it, and the levy was dismissed by order of the plaintiff, or his attorney, it was *prima facie* a satisfaction of the *fi. fa.* If the *fi. fa.* under which the negro was sold was fully paid off, no title could pass to the purchaser at Sheriff sale, and defendant claiming under said purchaser, had no title. But if he purchased from Sterling Elder for a valuable consideration, without notice of plaintiff's title, he was protected, even if the *fi. fa.* was paid off, provided the deed of gift previously executed by Sterling Elder to plaintiff was purely voluntary, and defendant had no notice of it. For though a deed made without valuable consideration, or to defraud creditors, is

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good between the parties, it is not good against subsequent purchasers, for value, and without notice.

To which charge plaintiff excepted.

The Jury found for the defendant, and counsel for plaintiff tender their bill of exceptions, and assign as error the charge aforesaid.

J. M. & W. L. CALHOUN; STONE & FITCH, for plaintiff in error.

TIDWELL & WOOTEN; and B. H. HILL, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We had no difficulty in reversing the judgment in this case, upon the ground, that the Court erred in charging the jury, that if Russell bought the negro from Sterling Elder, without notice of the previous deed of gift from Sterling to William Elder, then the purchase by Russell took precedence of the gift; for there is no evidence to authorize such a charge. There is no evidence that Russell bought the negro from Sterling Elder at all; and then the deed of gift was recorded within twelve months after it was made—a fact which by statute, see *Cobb's Digest*, page 176, is, I think, made equivalent to actual notice.

[2.] As this case was hastily argued, at the close of the Term, without a careful analysis of its numerous facts, we determined to confine our *judgment* in it to the point above stated.

Judgment reversed.

WILLIS L. CALLAWAY, plaintiff in error, vs. **JAMES D. FREEMAN**, defendant in error.

F. sells a town lot to R. and S., and takes their notes for the purchase money, giving them a bond to make titles, when the money is paid. The vendees go into possession, and employ C. to make certain improvements; C. files and records his mechanic's lien, and sues and recovers judgment on his claim against R. and S. In the meantime the purchasers finding they are unable to pay, agree to rescind the contract, taking up their notes and surrendering to F. his bond for titles. The lot is levied on by the *fi. fa.*, in favor of C., against R. and S., and claimed by F.

Held, That the property is not subject to the debt, notwithstanding F. had knowledge of the work, while it was being done, and made no objection.

Claim, in Spalding Superior Court. Tried before Judge **BULL**, at May Term, 1859.

On the 11th day of January, 1854, James D. Freeman, the defendant in error, sold a hotel, in the city of Griffin, to William B. Rowell, for three thousand four hundred and eighteen dollars, for which he took from Rowell his three promissory notes; one for \$1,000, payable one day after date; one for \$1,138, payable by the first day of January, 1856, and one for \$1,280 00, payable the first day of January, 1857, and executed to Rowell his bond, conditioned to make titles to said hotel, upon the payment of said notes. Rowell went into the possession of the property, and with one Benjamin J. Sanders retained the possession about six months, keeping a public house. During this time Callaway, the plaintiff in error, a carpenter, did certain work and repairs in and upon said hotel, and recorded his claim for said work as a lien on said property, in pursuance of the Act of 1837; upon his account for the work and repairs, he afterwards brought suit against Rowell and Sanders. Sanders alone was served with process, and plaintiff proceeded against him as one of two partners served, as provided by statute, and at November Term, 1856, obtained judgment for the sum of \$451 25, besides cost, and upon which an execution

was issued to be levied upon the hotel, and said judgment to be paid in preference to any other claim, as provided by law. The execution was accordingly levied upon the hotel, when James D. Freeman interposed a claim to said property.

It was further in proof, that the contract for the sale of the hotel was rescinded about the last of the year 1854 or 1855. Freeman gave up and surrendered the notes, given for the purchase money, and Rowell and Sanders surrendered and delivered up Freeman's bond for titles.

During the argument by counsel before the jury, after the testimony had closed, counsel for plaintiff stated, that they had just learned that they could prove, that Freeman had notice that plaintiff was doing the work at the time, and made no objection thereto, but allowed him to go on, and they proposed to prove this fact. This the Court refused, and counsel excepted.

The Court charged the jury, that when a party was in possession of property under a bond for titles, and the purchase money unpaid, and the contract of sale was afterwards rescinded, that a mechanic's lien for work done while the vendee or obligee was in possession, would not attach, unless the owner had notice that the work was being done, and did not object, or in some way assented to or ratified it; and in that case, the action for the work and repairs done, should be brought against the owner or holder of the legal title to the property; and that the property in this case, the defendant in *fi. fa.* never having title, was not subject to the mechanic's lien, or the *fi. fa.*; and directed the jury to find the property not subject. To which charge and direction, counsel for plaintiff excepted.

GREEN & MARTIN, for plaintiff in error.

L. T. DOYAL, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

Freeman sold to Rowell, or you may say, to Rowell and Sanders, for they seem to have become jointly interested in the property, a house and lot, in the town of Griffin in January, 1854, took three notes for the purchase money, and gave his bond to make titles when the notes were paid. The purchasers employed Callaway to make some repairs upon the building; occupied the premises some six months, and finding that they could not pay for the property, the contract was rescinded; Freeman returning to them their notes, and they surrendering up to him his bond for titles. Callaway filed and recorded his lien under the Acts of 1834 and 1837, (*Cobb*, 555, 557,) and subsequently sued and obtained judgment against Rowell and Sanders, and caused the execution issuing thereon, to be levied on the lot. Freeman interposed his claim, and the question being one of law, it was submitted to the Court; and the Judge decided that the property was not subject; and that ruling is assigned as error.

After the argument had commenced, Callaway proposed to introduce testimony before the Court, that while the work was progressing, Freeman had knowledge of it, and made no objection. The circuit Judge refused to hear the evidence, and this also is alleged as error. Believing that the proof should have been heard, we shall treat the case as though it were in; and we are clear, that the Court was right in holding, that the property was not subject to the mechanic's lien.

In *Harman and another vs. Allen & Co.*, 11 *Ga. Rep.* 45. this Court held, that under the lien Acts of this State, one could only bind property to the extent of the interest which he had in it. We adhere to this decision. What then was the interest which Rowell and Sanders had in this lot? None, as against Freeman, until it was paid for. By the Act of 1847, (*Cobb*, 517) Freeman could have obtained judgment

on his notes, filed a deed to the purchasers, sold the lots, and been entitled to the proceeds in preference to *any* other lien. Such is the express language of the statute. In other words, the vendor's lien, under the law, is paramount to that of the mechanic, or of any body else, and it is right; it is his property until paid for. He could, upon the failure of the vendee to pay the purchase money, have ejected him, regardless of any incumbrance which the purchaser may have created.

What are the rights of the mechanics? Looking to the interest of all parties, we hold that it is the privilege of the mechanic to tender to the vendor the purchase money. This was all he was entitled to, and thus have redeemed or rescued the property from this prior lien; and if, from its enhanced value, by reason of the improvements he put upon it, he could thus save himself, very well; otherwise it was his misfortune to have worked for those who were unable to pay him, and who had no right to bind that property for his security.

And suppose Freeman did stand by, and see those repairs made without objecting, he had no right to interfere. He had sold the property, and had a right to suppose, that the contract would be performed on the part of Rowell and Sanders; and what right had he to gainsay the transaction between his purchaser and Callaway.

Judgment affirmed.

Perkins, adm'r, vs. Brown.

WILLIAM PERKINS, administrator, *de bonis non cum testamento annexo*, plaintiff in error, vs. JOHN P. BROWN, defendant in error.

A will gave certain slaves to the testator's wife, for her life, with remainder to his children. The wife relinquished her life estate to the children, and divided out the negroes among them—she being the executrix. She died, and an administrator *de bonis non*, succeeded her. He brought trover for some of the negroes.

Held, That the relinquishment of the life estate, and the distribution of the negroes among the remaindermen, was evidence of assent to the legacy, and therefore, that the executrix, as well as her successor, the administrator *de bonis non*, was divested of all right to the slaves, and therefore, that he was not entitled to recover in the action.

Trover, in Pike Superior Court. Tried before Judge CABBANISS, at April adjourned Term, 1859.

This was an action of trover brought by William Perkins, as administrator *de bonis non* with the will annexed, of Moses Perkins, deceased, against John P. Brown, for the recovery of two negro slaves, Mary and Warren, alleged to be the property of plaintiff's testator.

The defendant pleaded the general issue.

Plaintiff offered in evidence his letters of administration *cum testamento annexo*, and the will of Moses Perkins, the first, second and concluding clauses of which are as follows:

"1st. After my just debts are paid, I give and bequeath unto my beloved wife Sarah Perkins, all my property, both real and personal, during her natural life, or widowhood, but after her death or marriage, to revert to my children, except one negro girl Nelly, one cow and calf, one bed and furniture, and my kitchen furniture, which my wife Sarah, should she marry, shall have, during her natural life, and after her death, said negro Nelly with all her increase (should there be any) to revert to my children.

2d. Provided my wife should die or marry before my

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youngest child arrives at lawful age, my property to be hired and disposed of to the best advantage, at the discretion of my executors, until the youngest child shall be of lawful age, and then to be equally divided amongst all my children, by sale or otherwise, at the discretion of my executors. Nevertheless, my executors may, at their discretion, as my children arrive at lawful age, give them such property as they think necessary, so as not to forego their equal part.

And I do hereby constitute, make and ordain my beloved wife, Sarah Perkins, and trusty friend, William Head, the sole executors of this my last will and testament," &c.

It was in proof, that Moses Perkins, the testator, died about the year 1824, and that his will was admitted to record and probate, in Jasper county, 6th May, 1824, and his widow took possession of his estate. Testator left ten children, and one was born after his decease; amongst his children was Epsey, a daughter, who intermarried with Henry Harrison, by whom she had three children. In 1849, Sarah Perkins the widow, made a division of the negroes which she held under said will, for her life, and surrendered them to her children, the remaindermen, and each received and took possession of his share; at this time both Harrison and his wife Epsey were dead. Epsey died before her husband, and the share coming to their children, who were infants, being two negroes, (the two sued for,) valued at four hundred and twenty-five dollars, were retained for them by said Sarah Perkins their grand-mother. All the children of Moses Perkins then living, were of age, assented to this division, and consented to the two negroes assigned to the children of Epsey, remaining in the possession of said Sarah, for them. Sarah Jane Harrison, one of these children, afterwards intermarried with defendant Brown, and they probably lived with Mrs. Perkins until her death, when Brown removed, and carried said two negroes away with him. He was appointed the guardian of William M. H. J. Harrison, an in-

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fant brother of Mrs. Brown ; and being thus in the possession of said negroes, plaintiff, one of the sons of Moses Perkins, deceased, took out letters of administration *de bonis non cum testamento*, on the estate of said Moses, and instituted this action of trover against defendant for said negroes.

The Court charged the jury as follows :

“ According to the will of Moses Perkins, a life estate in his negroes was conveyed to his wife, with remainder to his children, to be equally divided between them, upon the death or marriage of his widow ; with power to his widow to divide and assign to his children as they arrived at age, any of his negroes, so as not to exceed their respective shares, and this she had the power to do, by way of making advances to his children. Upon the assent of the executors, the life estate vested in Sarah Perkins, and the remainder in the children ; and the share in remainder of Epsey Harrison vested in her. If Sarah Perkins relinquished her life estate in the negroes, and distributed them amongst the children who were of age, as advancements, and kept one share of the negroes, that relinquishment and division was an assent to the legacy, and the title to the negroes vested in those to whom they were respectively assigned, and the share which remained in the hands of Sarah Perkins vested in the estate of Epsey Harrison if she was then dead. That was an administration of the estate of Moses Perkins, so far as the negroes were concerned, and the title of the executors was divested, and could not be revested in the executrix by any act of hers ; and under this state of facts, the administrator *de bonis non*, of Moses Perkins, had no title to the negroes, and could not recover. The administrator of Mrs. Epsey Harrison, if she died before her husband reduced the negroes into possession, was alone entitled to sue for and recover the same,” &c.

Counsel for plaintiff requested the Court to charge the jury, that if Sarah Perkins reserved the negroes for the children of Epsey Harrison, and not for her administrator, that

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did not amount to an assent to the legacy, and an execution of the will of Moses Perkins. The Court refused so to charge.

To which charge and refusal to charge, counsel for plaintiff excepted.

The jury found for the defendant, and plaintiff moved for a new trial, on the ground, that the Court erred in the charge above stated, and in refusing to charge as requested.

The Court overruled the motion for a new trial, and plaintiff excepted.

ALFORD; and GIBSON, for plaintiff in error.

GREEN & STEWART; and FLOYD, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in overruling the motion for a new trial? We think so.

The grounds of that motion were two; one the charge given, the other the refusal of the charge requested to be given.

Was the charge given, right? That charge was in effect, as follows; that if the executrix, Mrs. Perkins "relinquished her life estate in the negroes, and distributed them amongst the children," "and kept one share of the negroes, that relinquishment and division was an assent to the legacies," and she was divested of the title, which, as executrix, she had to the negroes, and consequently that there was no title left in her which could pass into her successor, the administrator *de bonis non*, and therefore, that he was not entitled to recover.

On this charge, there seem to be only two questions; one, did the relinquishment and division, amount to an assent by the executrix, to the legacy to the remaindermen? the other, if so, did that assent divest her of all title as executrix, and

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so leave none in her, to pass to her successor, the administrator *de bonis non*, the plaintiff in trover?

The relinquishment of her life interest, shows that she was claiming that interest under the will—she therefore, had assented to the legacy, so far as it was a legacy of an estate to her for her life; and that was an assent to it, so far as it was a legacy to the remaindermen. “If a term of years, or other chattel, be bequeathed to A. for life, with remainder to B., and the executor assents to the interest of A., such assent will enure to vest that of B.; and *e converso*; for the particular estate, and the remainder constitute but one estate.” 2 *Wms. exor's*, 986, *citing the cases*.

The division was a fact still stronger; that showed, that she also actually assented to the remainder part of the legacy.

Then, the part of the charge, to which the first question applies, was right.

Perhaps the assent of the executor, to a legacy, of even the slightest interest in a piece of property, is sufficient to divest him of all title to that property, and so, to prevent him from recovering the property at the termination or extinction of that slight interest. *Id.* 988.

But it must certainly be true, that if the legacy be of the whole interest in a piece of property, and the executor assent to that legacy, the assent will divest him of all title to the property, and so, will prevent him from ever recovering it; because in that case, the whole interest in the property passes to the legatee, and the right to sue for it, is a right of his. And here, the legacy was of the whole interest; it was a gift to Mrs. Perkins, for her life, with remainder to the children. The right then to sue for the property, passed out of the executrix, by her assenting to the legacy. If so, neither she, as executrix, nor any other representative of the testator's estate, could have the right to sue for the property. The right to sue for it, was in the legatees, or those claiming under the legatees. What particular persons these are, is of

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no consequence, in the present case. The Court below, it is true, expressed an opinion, as to the persons in whom was the title to the negroes in dispute, but it was not necessary, that the Court should do so, and we do not pass on that opinion. It is sufficient, that the part of the charge was right, which said, that if there was an assent, to the legacy, the plaintiff could not recover; it will be time enough to decide the question, whether the negroes belong to the children of the deceased child, or to her husband, when a case between the children and the husband arises.

We think, then, that the charge was right, so far, as the second question applies; and, therefore, that it was generally right—i. e., right in the conclusion to which it came, that the plaintiff was not entitled to recover—if there was an assent to the legacy.

Was the second ground of the motion good; the refusal of the charge requested?

If Mrs. Perkins, the executrix, received the negroes for the children of Epsey Harrison, who was dead, it shows, it is true, that she thought that the children, and not the husband of Epsey Harrison had succeeded to Epsey Harrison's rights in the negroes; but, it equally shows, that she had assented to the legacy, as a legacy to *Epsey Harrison*, who, and not the children, was the legatee. That the administratrix agreed that the children of Mrs. Harrison might receive the legacy, is evidence that she would have agreed, that Mrs. Harrison herself might receive it, if Mrs. Harrison had been alive.

We think, then, that the Court was right, in refusing to charge the jury, that Mrs. Perkins's receiving the negroes for the children of Epsey Harrison, and not for Epsey Harrison's administrator, did not amount to an assent to the legacy to Mrs. Harrison.

Judgment affirmed.

Barksdale, adm'r, and White, garnishee, vs. Greene.

TERREL BARKSDALE, administrator, and **ANDREW J. WHITE**, garnishee, plaintiffs in error, vs. **JAMES W. GREENE**, defendant in error.

- [1.] A judgment cannot be vacated on account of grounds which could have been taken before judgment, but have been negligently omitted, or taken and overruled.
- [2.] Where a case is pending in Court, all matters germane to it, may be introduced by way of amendment of the pleadings, and be then adjudicated along with the original matter, or the whole referred to arbitration, and the award made the judgment of the Court, according to the Judiciary Act of 1790.

Motion to set aside judgment, in Upson Superior Court.
Decision by Judge **CABANISS**, at May Term, 1859.

This was a motion by Terrel Barksdale, administrator of Macharina Bunkley, deceased, to set aside a judgment rendered in the Superior Court of Upson county, against said Barksdale, for counsel fees. In connection with this motion, was one by the counsel, to enter judgment against Andrew J. White, a debtor of said Terrel, who had been garnisheed—which two motions were heard together.

The judgment against Barksdale, had been obtained about as follows :

All the parties litigant and in interest in the case or cases pending or disposed of, respecting the contested wills of Macharina Bunkley, deceased, and her estate, entered into an agreement, whereby they fully, and finally adjusted, settled, and disposed of all the matters and questions in controversy between them, except the payment of counsel fees, and as to these, they agreed "to refer the whole question of counsel fees and the amount to be paid by Terrel Barksdale as above stated, in the whole litigation under said wills, and which have not heretofore been paid or are not herein above expressly provided for," to the Judge of the Superior Court of Upson county, to be settled by him at the May Term, 1858, of said Court; "said Court to hear and determine the whole

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questions of law and fact, and to adjudge and determine what fees are chargeable upon, and to be paid out of said estate, and also by the several parties and the amounts to be paid to each of the counsel," and by whom to be paid; reserving to each of the parties, and allowing to any of the counsel, who may thus submit the question of fees, the right to except to said decision and carry the same to the Supreme Court," &c.

Under this agreement and reference, the Judge awarded and adjudged to the counsel in said cases, certain sums to be paid to them respectively, by said administrator, and for which judgments and executions were issued.

Afterwards, at May Term, 1859, said Barksdale moved to set aside and vacate said judgment, on the following grounds, to-wit:

1st. Because, by the terms of the agreement, the same was not to be binding until all the parties signed it, and defendant alleges, that all the parties in interest did not sign said agreement before said judgment was rendered, nor have they signed it since.

2d. Because said case was heard, and the award made in the absence of many of the parties, and without notice to them.

3d. Because the parties were not called on by the Judge, the arbitrator, to answer whether they were ready for the hearing of said cause.

4th. Because said agreement was signed by some of the parties as executors, administrators and guardians, and is not binding upon the parties in interest, or represented.

5th. Because no notice was given that all the parties had signed said agreement, before the cause was heard and the award made.

Upon the hearing of this motion, defendant moved that the issues be submitted to a jury. The Court refused to submit the question as to the validity of the judgment to a jury,

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holding that it was a question to be decided by the Court. To which decision defendant excepted.

After hearing the evidence and argument of counsel, the Court refused the motion to set aside the judgment, and ordered judgment to be entered up against the garnishee. To which decision counsel for defendant excepted.

JAMES M. SMITH, for plaintiff in error.

PEEPLS & CABANISS; and GREENE, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

This is a motion to vacate a judgment. First, because all the parties to the submission had not *signed*, when the judgment was rendered. Second, because all the parties *did not* have *notice* when the hearing would be had. Third, because all the parties were not ready when the hearing was had. All of these grounds are met by a single view. Let it be borne in mind, that Terrel Barksdale was the only party moving to vacate the judgment. *He* had signed the submission; *he* had notice, and *he* made no suggestion of unreadiness, and was present in Court when the judgment was rendered. If the want of these things as to other parties was a defence for *him*, he was bound to make it *before* judgment. The *jurisdiction* of a Court being established, its judgment is conclusive (unless an appeal or writ of error be taken to a higher tribunal) as to all defences which could have been made but were negligently omitted. All such defences become *res adjudicata*. If a judgment does not settle *these*, it settles nothing—it is not only not an end of litigation, but it is not an approximation to the end—there can be no end. But there is another ground which attacks the jurisdiction of the Court. It is said the submission was to the Judge and not to the Court. To this, there are two conclusive answers. Such is not the true reading of the submission. It does say that

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the matters of law and fact involved shall be submitted to the *Judge* of the Superior Court, but we understand this to mean only a waiver of a jury upon matters of fact, for immediately afterwards, it provides that the *Court* shall decide the controversy at the May Term, &c., and adds, that either party shall have the right to *except* and carry the case to the Supreme Court. Is it credible that the skillful lawyers who framed that submission, supposed a case could be carried to the Supreme Court on a writ of error from the decision of an *arbitrator*? It is plain to us, that the true meaning of the submission taken as a whole, was to submit the controversy to the *Court, waiving a jury*. Again; even if the Judge were a mere arbitrator as contended, and not acting as a Court, yet the decision made by him was, by an order at the same Term, made the *judgment of the Court* in exact conformity with the Arbitration Act of 1799. See *Cobb's Dig.* p. 487. But it was said that neither of these answers are good, because there was *no case in Court*, and the parties could not put it there by their mere agreement, and the Arbitration Act does not apply except to cases *pending in Court*. The reply to this position is a simple recital of a few facts. There was pending in the Court a bill to review and set aside a former judgment (whether on good grounds or not, is immaterial,) refusing probate to a paper propounded as the will of Mrs. Bunkley. The will, if set up, disposed of her whole estate, and therefore the pending case involved the whole estate. To that bill, every party to this submission, and every person interested, either as heir at law or as legatee, was a *party*, duly served and legally in Court. They met together and agreed upon a settlement of the whole matter with one exception, and put the agreement in writing, and provided that it should be *filed as a Court paper*. It was so filed and we hold that it thence became a part of the pleadings in the pending case—an amendment germane to the original bill. The exception was counsel fees—how much, and who should pay them. The agreement provided

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for the settlement of this excepted matter by referring it to the decision of the Court without a jury. The judgment which might be rendered on that matter, was to form a part of the whole. It was so rendered, and as there was no writ of error taken on it, we clearly think it must stand, as a part of a settlement which adjudicates and puts to rest the whole litigation pending in the Court.

Judgment affirmed.

WILLIAM O. HALLORAN, plaintiff in error, vs. **WILLIAM C. BRAY**, defendant in error.

A controversy *not in suit*, was referred to the arbitrament of *two* persons, with power to them to choose a third, *as an umpire*. The two made an award, without having chosen an umpire, and one of the parties moved, that the award should be made the judgment of the Court.

Held, That, as the arbitration was not under, either the Judiciary Act of 1799, or the arbitration Act of 1856, there was no power or authority in the Court to make the award the judgment of the Court.

Arbitration and award, in Meriwether Superior Court. Decision by Judge BULL, February Term, 1859.

William C. Bray and William O. Halloran, referred "the matters in issue between them, in relation to the business of the White Sulphur Springs," to the arbitrament of William A. Redd and Rev. T. F. Montgomery, and agreed that their decision should be final, on a certain basis, &c. It was also agreed that the arbitrators should have the privilege of calling in J. M. Beall to aid them in the adjustment and adjudication of the matters referred. The arbitrators, including Mr. Beall, made their award, and at the February Term,

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1859, of the Superior Court of Meriwether county, counsel for Bray, moved to make the award the judgment of the Court; to which counsel for Halloran objected, on the ground that the arbitrators were not sworn. It appeared that the parties did not require the arbitrators to be sworn, and consented to dispense with the oath.

The Court granted the motion and ordered the award to be made the judgment of the Court, but without prejudice to any proceedings which might be had, to set aside the same for fraud. To which decision, counsel for Halloran excepted.

ADAMS & KNIGHT, for plaintiff in error.

GEO. A. HALL, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court right in making the award, the judgment of the Court?

If there is any law which authorizes this award to be made the judgment of a Court, it is the Judiciary Act of 1799, *Cobb*, 1140, or the arbitration Act of 1856, *Acts of* 1856, 222. Therefore, we must hold, that the Court below erred in making this award, the judgment of the Court, unless this case falls within one of those two Acts. Does it fall within either?

It does not fall within the Judiciary Act, for the only award that it includes, are awards made in cases pending in the Courts. This was not an award made in a pending case.

Neither does the case fall within the Act of 1856. The arbitration was not under that Act. The second section of that Act says, that "every arbitration shall be composed of three arbitrators, one of whom shall be chosen by each of the parties, and one by the arbitrators chosen by the parties."

In the present case, there were only two arbitrators; true,

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two, with power to select an umpire—a power which they did not exercise; but if they had exercised the power, two arbitrators and an umpire are not three arbitrators; an umpire intervenes only when the arbitrators disagree.

Besides, the Act, in other parts, clearly contemplates, that the third man, the appointee of the two appointees of the parties, shall be a full arbitrator; that he shall fully share with the other two in all their powers, and in all their duties. See the 4th and 10th sections.

The case not falling within either of these Acts, there was no power in the Court, as far as we know, to authorize it, to make the award the judgment of the Court. And for *this* reason, we think that the judgment of the Court making the award its judgment, was erroneous.

Judgment reversed.

**WALLIAM H. HUFF, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.**

An indictment under the Bastardy Act, will not lie in one county, when the child was begotten and born in another, and when the putative father was arrested, brought before the Magistrate and refused to give bond in the latter county.

An agreement by the defendant, that he will waive all objections as to jurisdiction, &c., and which he denies and refuses to abide by, to be binding and enforceable by the Courts, should be reduced to writing. Are defendants in criminal cases liable to be taxed with the costs of witnesses, who are subpoenaed and sworn but not examined? *Quere?*

Indictment for Bastardy, and motion for new trial, in Whitfield Superior Court. Tried before Judge CROOK, May Term, 1859.

Upon the information on oath, of Annis Morris, that she was pregnant with a child by William H. Huff, and that said child was likely to be born a bastard and chargeable to the county of Whitfield, a warrant was issued by the Justice of the Peace, before whom the oath was made, and Huff, refusing to give the bond and security required by law, for the maintenance of the child, was bound over to appear at the next Superior Court of Whitfield county, to answer said charge, &c. At the said Term of the Court, he was indicted for bastardy and refusal to give the bond and security aforesaid. To this indictment he demurred; the Court overruled the demurrer and the trial proceeded.

Annis Morris, the prosecutrix, testified: That at the time of taking out the warrant in February, 1858, she was pregnant with a child; it was begotten in the latter part of November, 1857, at the house of defendant in *Walker county*; it was born the latter part of August, 1858, in *Walker county*; she was living with her brother in *Whitfield county*, at the time she took out the warrant; had been living there three or four weeks before she took it out; she went to live with defendant at his request, and remained there fourteen months to supply his wants and necessities; defendant became dissatisfied and drove her off; she returned to *Whitfield county*; has no property, and the child is likely to become chargeable to the county; she is unmarried; she was induced by the promises of defendant to go back, he promising to do something for her and the child, but did not comply with his promises; that she never had connection with any other man than defendant.

It further appeared in evidence that the warrant for defendant's arrest, was issued by a Justice of the Peace of *Whitfield county*, but afterwards backed by a Justice of *Walker county*, where defendant resided, and where he was arrested 23d April, 1858, and taken before the Justice in *Walker county*, and refusing to give the bond prescribed by

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law for the support of the child, he was recognized to appear "at the April Term, 1858, of the Superior Court of *Whitfield county*, to be holden on the 4th Monday in April instant," &c.

The jury found the defendant guilty, who, thereupon moved for a new trial, on sixteen grounds, which it is unnecessary to set out, as the judgment pronounced by this Court, reversing the judgment of the Court below, is placed upon but one ground, that of want of jurisdiction in the Superior Court of *Whitfield county*; the child having been begotten and born in *Walker county*, and the defendant residing in that county.

The Court below refused to grant a new trial, and defendant excepted.

C. D. McCUTCHEN; D. A. WALKER; and J. A. GLENN, for plaintiff in error.

J. A. W. JOHNSON, Sol. Gen., *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

In this case we are clear, that apart from the defect in the indictment, accusing the defendant of being the *putative*, instead of the *actual* father of the bastard child, that *Whitfield county* had no jurisdiction over the case. The child was begotten and born in *Walker county*, and there Huff was arrested, brought before a magistrate and refused to give bond for the support and maintenance of the child. So that whether the fact of begetting the bastard, or the refusal to give a bond for its support, or both together, constitute the offence, under the statute, there is no pretext for assuming jurisdiction in *Whitfield county*. True, the mother resided there, except when decoyed off temporarily by Huff; and that might be a sufficient reason why the fine, in case of conviction, should be appropriated there. But unless both the

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offending parties reside in the same county, it will be found extremely difficult to prosecute, under the Bastardy Act of 1793. There is additional legislation needed. Perhaps, by the mother's taking up her residence in Walker county, and beginning *de novo*, a remedy might be practicable; I do not say it is so.

The verbal agreement between the parties, waiving all objections to jurisdiction, &c., if enforceable at all, certainly cannot be unless reduced to writing.

We say nothing about the question made in the bill of exceptions, as to the costs of the two witnesses who were sworn but not examined. As the defendant is relieved from all costs, he is not liable for the payment of this.

Judgment reversed.

M. A. HARDEN, et al., plaintiffs in error, vs. WEBSTER, L'ARMELEE & Co., for use of, &c., defendants in error.

- [1.] A certificate in the following form: "The above and foregoing is a true copy," &c., is a sufficient authentication of a record.
- [2.] When suit is brought against the claimant on his forthcoming bond, it is too late to insist that the appeal was not regularly entered in the proceedings, in which the property was found subject.
- [3.] In a suit upon a forthcoming bond, the execution under which the levy was made, is not only relevant but indispensable testimony to make out the case.
- [4.] When the forthcoming bond in reciting the execution varies, slightly, from the *ft. fa.* itself, it is a mere question of identity, for the jury to pass upon; or, if it is evidently a mere clerical mistake, the Court itself perhaps, would have the right so to determine.
- [5.] An instrument with a scrawl annexed to the signatures, is a bond, without purporting to be such upon its face.

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Debt, in Cass Superior Court. Tried before Judge Coox, March Term, 1859.

All the facts necessary to a full understanding of the points adjudicated in this case, are stated in the opinion of the Court.

SHROPSHIRE, MILNER & PARROTT, for plaintiffs in error.

WALKER, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The facts in this case are complicated, and it would be a useless labor to go through them all in detail. All I propose is, to examine very briefly some of the leading points.

[1.] The first objection is, to the sufficiency of the Clerk's certificate, of the exemplification of the records, from the Superior Court of Habersham county. The language of the certificate is, "the above and foregoing, is a true copy," &c. The complaint is, that it does not purport to be a full and entire transcript. In substance we think it does.

[2.] The second assignment is, that the plaintiff in execution confessed judgment to the claimant, reserving the right of appeal; and that it does not appear from the record, that any appeal was ever entered.

We do not think the regularity of the appeal can be attacked in this collateral way. No exception was taken to it at the time, and in the Court where the proceedings were pending. The claim was withdrawn, and a final judgment entered upon the appeal. In point of fact, the appeal was properly entered. The execution had been assigned by Webster, Parmelee & Co., the plaintiffs, before even the levy was made, and the appeal was entered by the assignee, instead of the original plaintiffs. Had the appeal been defective, and the objection taken at the time, it could have been

amended. The other grounds of objection to the appeal, are not insisted upon ; and are not sustainable if they were.

[3.] It is next objected, that the execution tendered in evidence, is irrelevant. We think on the contrary, that it was indispensable to the maintenance of the suit on the forthcoming bond. And according to the evidence in the case, it was after the claim was withdrawn, the two negroes, John and Betsey, were re-advertised for sale, and for the first Tuesday in October, 1842. The Cassville Pioneer was admitted in evidence, to prove this fact. It was again re-advertised in August, 1849, within seven years of the previous levy ; what became of the first levy, or why so much time intervened between the first and second advertisement of the negroes, the record does not disclose. The *fi. fa.* was not dormant in 1849 ; and the advertisement of that date was a sufficient notification, to the obligors upon the forthcoming bond, to produce the property on the day of sale.

[4.] It is objected, that there is a material variance between the execution and the recital of it in the forthcoming bond. And it is true, that in one, McLaughlin is said to be the principal defendant, and Powell the original security, and John H. Jones the security on appeal. And in the other, the names of McLaughlin and Powell are reversed. But this was a question of identity. No one could doubt that it was a mere clerical mistake, a *lapsus pennæ*. It was a question for the jury. The Court itself, perhaps had the right to determine, that the alleged variance amounted to nothing.

[5.] Was the instrument sued upon, a bond ? It had the scrawl annexed to the signatures of the obligors. Even before the Act of 1838, such a paper was generally held to be a bond. That Act declared it to be so ; and even that an instrument purporting to be a bond, was such, without the scrawl. The contrary had been the prevailing opinion, as to this latter class of writings.

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There was no motion for a new trial in this case, and we see no reason to send it back for that purpose. And affirm generally all the rulings of the Court below.

Judgment affirmed.

JOSEPH M. DRUMRIGHT, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

- [1.] Under an indictment for carrying a negro out of a county, the beginning of the offence is the commencement of the carrying, and the end of it is the crossing of the county line; and all that is done from the beginning to the end, and all that is said, is admissible in evidence as a part of the *res gesta*.
- [2.] The sayings of other persons are admissible against a party when it affirmatively appears that he assented to them by his silence, or in some other way.
- [3.] When the defendant justifies his act by showing the consent of a person whom he alleges to be the true owner, he cannot show the fact by *affidavits* of that person asserting a *claim* to the negro.
- [4.] The defendant may justify his act in carrying away a negro from the adverse peaceable and legally acquired possession of another, by showing the consent of the true owner.
- [5.] He cannot justify himself by the consent of one who he *thinks* is the owner, unless he be either the true owner, or some other person who truly has, and not merely professes to have, authority to grant such consent.

Misdemeanor, in Fulton Superior Court. Tried before
Judge BULL, April Term, 1859.

All the facts necessary to a full understanding of the points adjudicated in the case, appear in the following opinion of the Court.

SIMPSON; OVERBY & BLECKLY; and GLENN, for plaintiff in error.

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Solicitor General T. L. COOPER, *contra*.*By the Court.*—STEPHENS J. delivering the opinion.

[1.] We think the evidence offered by the defendant, showing his sayings while engaged in the act of removing the negro beyond the limits of the county, ought to have been admitted as a part of the *res gestæ*. He was indicted under the Act of 1856 (see *Acts of 1855-'6*, page 264) for carrying a negro out of the county of Fulton without the consent of the owner or other person having authority to give such consent. The offence began when he commenced to carry the negro, and it ended only when he crossed the county line. What he did from the beginning to the end, was the act whose criminality was under investigation, and all that he said about the act while he was performing it, constitutes a part of it.

[2.] We think the sayings of other persons in the presence of the defendant were properly admitted against him. What a party himself says, is admissible against him, and what is said by others and is *heard* and goes *uncontradicted* by him, is equally so. But in the case of sayings by other persons, it ought to be made affirmatively to appear that he *heard* the sayings, and that he assented to them either expressly, or by his silence, or by his treatment of them in some way showing *assent*. His assent to them is the thing which makes them admissible against him, and that assent must be shown in some way, before the sayings can be admitted.

[3.] We are not prepared to say there was error in the rejection of the affidavits of Mrs. King and Mrs. McGarr. Whoever may have been the owner of the negro, the fact could not be legally proven by *affidavits*—it could be proven (so far as the proof was derived from witnesses) only by such witnesses as were on the stand, subject to cross-examination. Whether it was admissible to show a *claim* of title by Mrs. King (whose consent the defendant had) in contradistinc-

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tion from a true title in her, by way of showing the probable *bona fides* of the defendant, will be considered when I come to the charge requested on that subject by the defendant, and refused by the Court.

[4.] We think all of the charges requested by the defendant ought to have been given, except the last one. The crime consists in carrying away the negro *without the consent* of whom? The *owner*, or the person having authority to give such consent. The ownership is the gist of the inquiry. The Court below seemed to assume that peaceable and legally acquired possession stands in the place of ownership. True, such possession is *prima facie* title, and so is naked possession *prima facie* title, but neither is equivalent to ownership, and either may be rebutted by showing that the true ownership or title, is elsewhere. We do not think the statute intends to punish a man who carries away *his own* negro, although he may carry him away from the adverse, peaceable and legally acquired possession of one who having this sort of possession, may yet have no *right* of possession. The hirer of a negro, for instance, has peaceable and legally acquired possession, and he may retain him in adverse possession after the period of the hiring has expired, but he would have no *right* so to retain him, and I apprehend the true owner might remove the negro without incurring the high penalty of this statute. It matters not from whose possession the negro is carried, provided he is carried either by the true owner, or by the consent of the true owner, or by the consent of any other person having authority to grant such consent. There are many such "other persons," including the owner's bailees of various kinds, and including also, I should say, him who may be in adverse, peaceable and legally acquired possession under a *bona fide claim* of title. The statute protects the party who carries away, provided he has the consent of either the true owner (a word which defines itself) or of any other person having authority to grant such consent, leaving that

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“other person” to be determined by the general law of property and possession. A reasonable doubt on either of these points, is a reasonable doubt as to the *guilt*, and ought to acquit. We think too that if Mrs. King had a good title, it was not impaired by the administrator’s adverse sale, she causing her claim to be proclaimed at the sale as the evidence shows she did.

[5.] The last charge requested by the defendant involves the question how far is a person carrying away a negro, protected by *appearances* as contradistinguished from the truth of the case? This branch of the case was but slightly argued, and none of us, I believe, was prepared to pronounce upon it with clearness and satisfaction to ourselves. But we were all inclined to the opinion that the charge was properly refused. With myself, subsequent reflection has somewhat strengthened that opinion. If a man carries a negro away from one who has an adverse, peaceable possession, and who therefore, is the apparent owner, he must take the *hazard* of the true ownership. If he disregards the apparent ownership, he must get the consent of the true owner at his peril. If he sets at naught those patent appearances which arise from peaceable, adverse possession, he cannot protect himself by other appearances; if he chooses to act in such a case, he does so at the peril of having the consent of the true owner. It is needless to add, that the charge which was given, is in conflict with the principles already announced.

Judgment reversed.

Cole vs. Dyer.

HERBERT COLE, plaintiff in error, vs. EDWARD DYER, and others, defendants in error.

The Act incorporating a railroad, contained this provision: "And no subscription shall be received and allowed, unless there shall be paid to the commissioners, at the time of subscribing, the sum of five dollars on each share subscribed." This provision was not complied with. The corporation, nevertheless, organized itself, by electing directors, &c., and commenced building the road, by contracting with persons to grade it, &c. Some of those persons were not aware of the failure to pay the five dollars a share, or the subscriptions for stock. Afterwards, one of the stockholders who was aware of that failure when he became a stockholder, and who voted at the election of directors, and otherwise aided in setting up the corporation, applied to the Court, for leave to file an information in the nature of a *quo warranto*, against the directors, to require them to show by what authority, they exercised their powers. The Court rejected the application.

Held, That the Court did right.

Quo Warranto, in Walker Superior Court. Decision by Judge Crook, May Term, 1859.

This was an application for a writ of *quo warranto*, to be directed to certain persons therein named, requiring them to show cause by what authority they exercised the powers, privileges and immunities of the corporation, created by the Act of the General Assembly of the State of Georgia, passed 22d day of January, 1852, under the name of "The Coosa and Chattooga River Railroad Company."

The petition states that said Act provides for the construction of a railroad from the Western & Atlantic Railroad at or near Ringgold, through the counties of Walker and Chattooga, to the line of the State of Alabama. The capital stock of said company to be \$400,000, and certain persons were appointed commissioners to open books of subscription, &c.; that the commissioners opened the books for subscription, and petitioner subscribed to the amount of seven shares, and others subscribed various sums, which subscriptions the petitioner alleges are not valid and binding on the subscribers on account of the failure to pay at the time of subscribing five dollars on each share as required by

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said Act of incorporation; nor did said commissioners issue certificates according to the provisions of said charter; that the entire stock was taken, and subscribed for, by eleven persons, who did not intend to construct said road, and that the only organization of said company was under the stock thus subscribed, and that organization was null and void, and that no sufficient amount of stock has ever been subscribed to authorize the formation and organization of said company as provided by law; and further, that the charter requiring said road to be commenced within four years, has not been complied with, and that said charter thereby expired by the terms and provisions therein contained.

The petition further states, that Edwin Dyer, Augustus B. Culberson, Samuel McWhorter, James C. Wardlaw, Samuel Hawkins, John Woods and M. R. Allen, claim and insist that said company has been legally organized, and that they are the directors thereof, and that they have elected Edwin Dyer President, and Augustus B. Culberson, Secretary and Treasurer; and said board of directors are assuming to act as a corporation, and exercising all the powers and privileges conferred by the charter aforesaid, and are proceeding to collect money and make contracts in relation thereto without lawful authority, and contrary to the provisions of the Act of incorporation, and have made calls on the subscribers of the stock aforesaid for installments thereof.

The petition prays that they be required to show cause, by what authority they assume to exercise the powers and privileges aforesaid.

The respondents in response to the *rule nisi*, answer, that the General Assembly of the State of Georgia, did pass an Act for the incorporation of the Coosa and Chattooga River Railroad, as stated in the petition, and that the commissioners opened books of subscription as required by said Act, and they admit that instead of five per cent. being paid in cash on the capital stock at the time of subscription

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as required by said charter; that the commissioners received the notes of subscribers for that amount payable on demand.

They admit that the original subscription of the capital stock of \$200,000 was made by only eleven persons; that the period having nearly elapsed for securing the charter under the provisions of the Act of incorporation, these eleven persons did subscribe for stock to the amount of \$200,000, not intending to hold or pay for the same, but for the purpose above stated of saving the charter; that the company was organized by these original subscribers, and afterwards others, upon becoming subscribers, were let in, and a certain portion of the stock thus originally subscribed for, was transferred to said new subscribers, and after about \$125,000 was thus taken by others, there was a transfer of stock to this amount to them and the present board of directors elected and officers appointed, and operations have been commenced on said road, contracts let, and the work is in progress, &c.

Upon hearing the foregoing petition and answer, the Court dismissed the *rule nisi*, and counsel for petitioner excepted.

LAWSON BLACK, for plaintiff in error.

By the Court.—BENNING J. delivering the opinion.

According to the bill of exceptions, this case was regarded and treated, in the Court below, as "an application for leave to file an information in the nature of a *quo warranto*;" and the judgment of that Court, made on consideration of the petition and the answer, was a refusal to grant the application. The case will be regarded and treated in the same way, in this Court, although the proceedings seem to be not entirely such as would be regular in a mere application for leave to file such an information.

The question, then, will be, was the Court right in refusing to grant leave, to file the information?

The corporation is a private corporation; and, "It is said

by Mr. Wellcock, that the Court will not sanction this proceeding, *either when the franchise is not of a public character*, or the applicant appears to them in the light of one intermeddling with the affairs of others; in these cases they will leave him to inform the attorney-general, who will use his own discretion as to filing the information." *Ang. and A. Corp. sec. 736; Id. sec. 745, and cases cited. Grant on Corp. 252-3, and cases cited.*

We are not aware of any English case of a private corporation, in which an application for leave to file an information, was sanctioned; there are many English cases in which it was refused. It is true, that there are some American cases, in which it was granted; but unless these rest on English law, they are not authority in Georgia. *A. and A. sec. 736.*

Let us concede, however, that there is law, to authorize the application in such a case as the present case, is there any law to require, that the application should be granted?

This, at least, is true; that if the Court is ever at liberty to grant the application in the case of a private corporation, it is never under obligation, to grant it, either in that case, or, in even in the case of a public corporation. Whether the Court will, in any case, grant it, or not, is matter of discretion. *Ang. and A. sec. 739, and cases cited. Grant, 253.*

This Court does not interfere with the discretion of the Superior Courts, except in cases in which, it is clear, that the discretion has been exercised by them, very improperly. Is this one of those cases?

Herbert Cole, the applicant for the leave, was a stockholder in the corporation, and must, at the time when he became one, have been aware of all the matters of which he complains, for he became one by taking a part of the stock on which, there had been the failure to pay in the five per cent. required to be paid in, by the charter, and, we must presume, that, when he took this stock, he informed himself, as to whether any thing had, or had not, been paid upon it.

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He took, from the original subscribers, a part of their stock, and they had paid nothing on their subscriptions. The class of stockholders to which, he belongs, passed a resolution in the following words. "Resolved, that we the stockholders of the Coosa and Chattooga Railroad Company, to whom has been transferred, a portion of the stock of said company, the amount of which, will appear, by reference to the stock book of said company, by the original stockholders of said company, do hereby agree, to have transferred to us, by the original stockholders of said company, the residue of stock, held by them, the proportion to the amount heretofore transferred to us, severally." It is to be presumed, that Cole went with his class, helped to pass this resolution.

After this resolution was passed, the stockholders consisting of the old, and the new, set, of which last, Cole was one, made a new election of directors; and then those directors elected a President and Secretary, and a Treasurer, and put the corporation in motion. We must in the absence of proof to the contrary, presume, that Cole was present at this election of directors, and participated in it; perhaps, we ought to presume, that he voted for the persons who were elected, for he is silent on the subject in his petition, and it must have taken a majority to elect, and there are more chances that a voter belongs to the majority, than, to the minority.

This is not all. The corporation, under its new organization, went forward and engaged in the work of building the road; they made contracts for grading, &c. with various persons, some of whom were citizens of Tennessee, and therefore, it is to be presumed, strangers to the matters complained of. These persons have done much work under their contracts. Some of the heavier sections of the road, being almost completely graded. In a word, these persons have acted on the faith of the legality of the organization of the corporation, an organization which the stockholders, Cole among them, held out to the world, as legal.

Thus then, we may say, that Cole, at the time when he

became a stockholder, was aware of the matters of which, he now complains; that, he sanctioned those matters, and helped to make them worse, not only by himself taking some of the vicious stock, but by assisting at the election of directors and perhaps, by voting for the very persons, as directors, whose authority to act as directors he now questions; and that men, some of them innocent men, have spent time, and money, and labor, in consequence of this conduct in him, and similar conduct in his fellow stockholders. And the question is, was it an improper exercise of the Court's discretion, to refuse such an application of such a person?

And we think that it was not.

An information has been refused to one, "who voted at the election sought to be impeached on the ground of an objection to the presiding officer," where he did not show, "that he was ignorant of the objection at the time of voting, to one who concurred in the act, or acquiesced in the title, of the defendant, which" he sought "to impeach;" to many other persons, on the ground of personal objection to them. *Ang. and A. sec. 745, and cases cited.* "A general principle on which, the Court acts with respect to the qualification to be a relator, is, that he who has concurred in inducing a party, to exercise an office, cannot be heard, on an application to turn him out of the office." *Grant Corp. 254, and cases cited.*

The effect of sustaining an information founded on the grounds stated in the petition, would be, to dissolve the corporation; and the dissolution of the corporation, would extinguish the debts due to and from it; and this Court held in *McDougald's, adm'rx., vs. Bellamy*, 18 Ga. 411, that stockholders in a bank whose charter contained a provision similar to the provision in this charter, were not entitled to insist on a non-compliance with that provision, to shield themselves from their ultimate liabilities to pay the bills of the bank. Do innocent contractors to grade this railroad, stand on a worse footing than the billholders of a bank?

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On the whole, we affirm the judgment of the Court below. In doing so, however, we wish to be considered as deciding merely the rights of the plaintiff in error, Herbert Cole, and as not intimating an opinion as to the rights of others, and especially of the State.

Judgment affirmed.

ROBERT ANDERSON, tenant in possession, plaintiff in error, vs.
LEWIS A. DUGAS, lessor, defendant in error.

- [1.] A deed recorded after the lapse of twelve months from its execution is good against another deed from the heirs at law of the same grantor, the last being recorded within twelve months after its execution, but not executed till after the first had been recorded.
- [2.] A power of attorney, under which a deed is made, is a muniment of title, and may be recorded along with the deed, but its record is not necessary to the validity of the record of the deed.

Ejectment, in Walker Superior Court. Tried before Judge CROOK, May Term, 1859.

This was an action of ejectment by Doe, *ex dem.*, Lewis A. Dugas, against Robert Anderson, tenant in possession, to recover lot of land No. 134, in the eighth district and fourth section of originally Cherokee now Walker county.

Plaintiff's lessor offered and read in evidence a grant from the State of Georgia to Wm. Whitecombe for the lot of land in controversy—grant dated 9th day of November, 1832; then a power of attorney from Whitecombe to John W. Wilde, authorizing him to sell and convey said lot of land to Lewis A. Dugas, the lessor; the power of attorney dated 25th April, 1832, but never recorded, was read in evidence by consent and without objection; then a deed executed by Wilde, as

attorney in fact for Whitecombe, conveying said lot to plaintiff's lessor, Dugas—this deed bears date 1st December, 1832, and recorded 13th of May, 1835.

Plaintiff then proved that the defendant was in possession, and had been since 1850, and the value of mesne profits, and closed.

Defendant proved that William Whitecombe died in the year 1834, leaving as his heirs at law his two children, Penelope Whitecombe and Laura E. Whitecombe. He then offered and read in evidence a deed from said heirs at law to himself for the land in dispute—said deed bearing date 23d October, 1849, and recorded 10th January, 1850. Here defendant rested, and upon this proof requested the Court to charge the jury:

1st. That if the plaintiff's deed was not recorded within twelve months from its date, and defendant bought the land from the heirs at law of William Whitecombe, the grantee, and had his deed from them recorded within twelve months from its execution, then defendant's deed is the better one, and will prevail over plaintiff's, and they should find for defendant unless he had notice, at the time he purchased, of plaintiff's title.

2d. That if plaintiff's deed was recorded before defendant bought the land, but was not recorded within twelve months from its date, and the power of attorney, under which the deed to plaintiff was executed, had not been recorded before defendant purchased from the heirs at law of Whitecombe, then the recording of the deed alone was not sufficient notice to defendant of plaintiff's title.

Which charges the Court refused to give, and defendant excepted.

The jury found for the plaintiff the premises sued for, and three hundred dollars for mesne profits.

Whereupon, counsel for defendant tendered his bill of exceptions, and assigns as error the refusal of the Court to charge as above requested.

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WARREN AKIN, for plaintiff in error.

UNDERWOOD; ALEXANDER; and DABNEY, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We think the Court was right in refusing to charge that the defendant's deed, which was from the heirs at law of the deceased grantee, and was recorded within twelve months after it was executed, should prevail over the plaintiff's deed, which was from the grantee himself, and was recorded, though not within twelve months after its execution yet before the defendant's deed was executed. The object of registry is to give notice to the world. The difference between recording within twelve months and afterwards, is this: In the first case, it is notice from the date of the execution; in the last, from the date of the recording. A deed is not debarred from record because not recorded within twelve months; and when recorded at all, it operates as a notice at least from that time. The plaintiff's deed in this case, though not recorded within twelve months after it was made, yet had been recorded more than fourteen years when the defendant's deed was made. The plaintiff's deed was the best.

[2.] It was urged that the record of the plaintiff's deed was not valid, because the power of attorney, under which it had been made, was not recorded along with it, and indeed, had never been recorded at all. We do not think that the recording of the power of attorney was necessary to make the record of the deed serve as notice. The power of attorney is a muniment of title, and may therefore be properly recorded along with the deed. It is the authority for making a conveyance, but it is not the conveyance; nor, strictly speaking, is it a part of the conveyance. The deed is the conveyance. The deed purports to be made by the authority of a power of attorney. If that is true, it is an authentic,

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genuine conveyance; if false, it is a forgery. So may any deed, made without the intervention of an agent, turn out to be a forgery. In either case, if the deed purports to be an authentic, genuine conveyance, it is notice to the world that such a conveyance has been made; and in neither case is it necessary to give *proof* that it is not a forgery. It is the *published assertion*, and not the truth of it, which constitutes the *notice*. When the notice is given, then the deed is good for just what it is worth according to the truth of the case.

Judgment affirmed.

WALTON ECTOR, transferee of GEO. D. SHARP, plaintiff in error, vs. JOSEPH L. WELSH, defendant in *fi. fa.*, and WILEY B. ECTOR, guardian, &c., claimant, defendant in error.

- [1.] Under our statute of 1854, (see *Acts of 1853-54*, p. 49,) confining objections in trials in the last resort, against depositions taken under commission, after the case has been submitted to the jury, to those which are based upon irrelevancy, no objection on account of the evidence being hearsay will be entertained. STEPHENS dissenting.
- [2.] The single fact that a donor retains the possession of the property given, is sufficiently explained by showing that he is the parent, or stands *in loco parentis* to the donee, who is a minor and resides with him.
- [3.] The admissions of parties are not to be regarded as an inferior kind of evidence, but the testimony which proves that admissions were made, and the terms in which they were made, should be scanned with caution.

Claim, in Meriwether Superior Court. Tried before Judge BULL, at February Term, 1859.

This was a claim interposed by Wiley B. Ector, guardian of Elizabeth Victoria Johnson, to certain negroes, levied on as the property of Joseph L. Welsh, by virtue of an execu-

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tion in favor of George D. Sharp, against said Welsh, and transferred to Walton B. Ector.

The jury found for the claimant, and plaintiff in *fi. fa.* moved for a new trial on the following grounds:

1st. Because the Court erred in admitting in evidence the answer of George D. Sharp to the last direct interrogatory, which answer was as follows: "All I know about this question is, that Joseph Duncan told me that they wanted this execution for Ector, so that they could cover the property levied on, and keep it from being sold for Welsh's debts hereafter."

The objection to the reading of this answer was taken after the case had been submitted to the jury.

2d. Because the Court erred in refusing to admit that part of the answer of Joseph Duncan, to the second interrogatory, as follows: "Witness heard Mr. George D. Sharp say, in witness's store in the town of Greenville, that he had sold the White Sulphur Springs, and the lands thereto attached, to Joseph L. Welsh, defendant in execution, for \$8,500; and also heard Mr. Welsh and his wife both say that they had purchased said premises, and that the aforesaid sum of money was the consideration for the same, for which, witness thinks, Welsh said he had given his notes, and took Sharp's bond for titles—all of which took place a few days after the trade, which was in the year 1838 or 1839, as well as witness now remembers."

The objection to this answer was taken after the case had been submitted to the jury; the objection was sustained, and the answer excluded on the ground of irrelevancy.

3d. Because the Court erred in charging the jury, that if Welsh never reduced the property to possession as his own, by virtue of his marital rights, and died before his wife, it was not subject to his debts. And further, that although possession by the donor, after an absolute conveyance, was a badge of fraud which might be explained, and unless explained became conclusive, yet if the defendant in *fi. fa.*

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(Welsh) took and held the possession of the property conveyed, the donee being a minor, this was a sufficient explanation of his possession, provided the transaction was otherwise fair.

4th. Because the Court erred in charging, that "the testimony of a witness purporting to give the statements, saying, and declarations of parties, was an inferior kind of evidence, yet it should be considered by the jury, and taking into consideration the situation of the witness and his opportunities of knowing and hearing what he testifies to, they might give it such weight as they thought proper."

5th. Because the verdict was contrary to law and the evidence.

The following is the deed of gift above referred to in the charge of the Court below, and commented on in the opinion pronounced by this Court:

"GEORGIA, MERIWETHER COUNTY.

Know all men by these presents, that we Joseph L. Welsh and Dolly Welsh his wife, for and in consideration of the natural love and affection which we respectively have for and towards Elizabeth Victoria Johnson, (child and daughter of the said Dolly Welsh by her former husband, Doctor Benjamin Johnson,) do by these presents give, grant, alien, convey, assign and relinquish unto her, the said Elizabeth Victoria Johnson, all and singular the rights and interest which we or either of us now have or may hereafter acquire, either in law or equity, to all and singular that part or portion of the late Hugh W. Ector's estate to which she the said Dolly Welsh, formerly Dolly Ector, is or may be entitled to as one of the distributees of said Hugh W. Ector's estate, and all and singular such interest as the said Joseph L. Welsh may have acquired in the said Ector's estate, by virtue of his intermarriage with the said Dolly—to have and to hold the same unto her, the said Elizabeth Victoria Johnson, and her heirs forever in fee simple, free and discharged from all claim or claims which we or either of us have to the

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aforesaid property real or personal. In testimony whereof, we have hereunto set our hands and seals, this the 8th January, 1841.

JOSEPH L. WELSH, [L. s.]

DOLLY WELSH. [L. s.]

Signed, sealed and delivered in the presence of

A. F. BRANNON,

A. H. BELYUE,

GEO. W. TURRENTINE, J. P.

The Court overruled the motion for a new trial, and counsel for plaintiff excepted and assigned said refusal as error.

DOUGHERTY; and ADAMS & KNIGHT, for plaintiff in error.

B. H. HILL, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We are all agreed that there ought to be a new trial in this case, but we differ as to the ground on which it ought to be placed. A majority of the Court place it upon the rejection of Duncan's answer (to written interrogatories) respecting the *sayings* of Sharp and of Mr. and Mrs. Welsh; the objection to the testimony having been taken only after the case had been submitted to the jury. My own opinion is, that this evidence ought to have been excluded, but that the testimony of Sharp, (also written depositions) respecting the *sayings* of Duncan, was illegally admitted. We all agree that both pieces of evidence are in the same predicament—are simple hearsay. My colleagues think both pieces ought to have been admitted, and the error they find is that one was rejected. I think both ought to have been excluded, and the error I find is that one was admitted. They are both confessedly inadmissible, unless they were required to be admitted by our statute of 1854. See the *Acts of 1853-54*, page 49. The title of that Act, so far as the title relates to

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this question, is "to *regulate* the admission of testimony in certain cases." The title, therefore, leads me to expect no *creation* of evidence, but only a regulation of the admission of what was evidence before. The words of the Act are: "That (on all appeal?) trials or other trials in the last resort, all exceptions to interrogatories, the execution of commissions, [commissioners,] or answer of witnesses examined under commission, when the commission has been duly returned and the same ordered or consented to be opened, and been for one day subject to inspection, shall be taken and determined before the case is submitted to the jury, otherwise the testimony shall be received, subject only to the objections that may be made for *irrelevancy*." The old law was, that the whole deposition of a witness could be ruled out whenever offered, for want of conformity with any statutory requirement in relation to testimony taken under commission. The mischief was, that a party was sometimes obliged to proceed with his case (having submitted it to the jury) with the loss of valuable legal evidence, which could manifestly be saved by a *re-execution* of the commission. The remedy is to require all exceptions founded on *curable* defects, to be *determined before the case is submitted to the jury*, so that the party, if the exceptions are well grounded, may continue the case when it is called, and have an opportunity to *cure* the defects in his evidence. The whole provision of the statute relates, in my view of it, to only such exceptions as are *curable*. They are to be determined before the case is submitted to the jury for no possible good reason except that they may be cured if they *can* be cured, by a re-execution of the commission. Why give time to cure what is incapable of being cured? The object is to give time for procuring evidence which cannot *now* be received. But why give time to procure evidence which *never will be* received if objection is made to it? Can it be supposed that written depositions, with all the abuses and defects inseparably inherent in this sort of testimony, was ever intended to be placed on a more

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favorable ground than the statements of the witness from the stand? Yet this consequence follows, if his written report of hearsay or gossip must be received, when his oral statement of the same thing would be rejected. Again, can it be supposed that it was intended to introduce so radical a change into the law of evidence, as to allow mere *gossip*—"an old wife's story"—without a known author, and dependent for its passage on down to the witness, upon untold rehearsals, to be forced on the consideration of a jury against the objection and protestation of the opposite party? Was it *intended* that the jury should consider evidence coming without the sanction of an oath or any other of the legal sanctions importing verity? And especially, was it intended to introduce this radical change, not from any conviction of its propriety as a rule of evidence, but as a mere compliment to that vehicle of evidence which is confessedly the most defective and the least to be favored? But my colleagues say, in answer to all this, that they are constrained by the letter of the statute, which says the "testimony shall be subject *only* to objections on account of *irrelevancy*." They say that whatever *relates* to the point in issue, whether it come from a reliable or a worthless source, is *relevant*, and must be admitted. Such may be the strict technical meaning of the term, but surely it *admits* of a popular use more in harmony with the general intent of this statute. It is common for one of two persons discussing their own affairs, to tell the other that what another person may have said about the affair, is "neither here nor there," is *out of place*, is *irrelevant*. That which is unworthy of consideration, may well be called *immaterial* or *irrelevant*, but that all mere hearsay is *unworthy*, the common law emphatically declares, and this statute certainly does not declare to the contrary as a general principle. I do not, therefore, give the force that my colleagues do, to this one word which admits of a far less mischievous sense, and which, if far less flexible, would be overborne, I think, by the abundant evidence of a different and much more rea-

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sonable general intent. It is a case, I think, where the letter ought to yield to the manifest spirit. *Qui hæret in litera, hæret in cortice.*

[2.] It is undoubtedly good abstract law, as charged by the Court, that the wife's interest in an estate is not subject to her husband's debts, if he dies without ever having reduced it into his possession, leaving her surviving him. The only doubt is whether the evidence authorized such a charge. The evidence is all concurrent, that Welsh did have *a certain* possession of his wife's interest, but whether that was *his* possession for himself, or a possession for his wife's daughter, depends, we think, upon the question whether or not the joint deed of gift of himself and wife, conveying that interest to his step-daughter before it had come into his occupancy, was a valid deed against Welsh's creditors, who were such when the deed of gift was made. It was said in argument that it was valid (though voluntary) as a settlement of the wife's equity; that it is such as a Court of Equity will sanction though it has not ordered it. The question with me, and I believe with all of us, is whether a Court of Equity will order or sanction any settlement which excludes from its benefits both the wife and the fruit of the marriage. Is not the husband himself interested in having a support secured to his wife, and would a Court of Equity order him to make any settlement which excludes her? If not, then will it *sanction* a settlement which it would never have directed? If the settlement was not a good one, then the possession which he afterwards got was his own and not his step-daughter's. We are not satisfied as to this charge, and decide nothing as to it. We only throw out the points in it on which we would like to see authority, if the case should ever come before us again.

[3.] We think there was no error in charging that the single fact of the donor's retaining possession of the thing given, is sufficiently explained by showing that the donee lives with

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him and is a minor, being his child, or standing in the place of his child. This we think is good law; but I must remark that it is not applicable to this case, unless the deed of gift would be valid without the difficulty from failure of change of possession from donor to donee; that is to say, unless the deed would be valid if the possession under it had gone directly into the donee, instead of into the donor for her.

[4.] We do not think that admissions by parties are to be regarded as an inferior kind of evidence; for, on the contrary, when satisfactorily proven, they constitute a ground of belief on which the mind justly reposes with strong confidence.

But, it is true, that the proof of the fact that admissions were made, and of the terms in which they were made, ought to be cautiously scanned. We do not all of us think there was distinct error in this charge as given, but for myself I do think so. I do not perceive what reason there is for pronouncing a sentence of degradation on this sort of evidence.

Judgment reversed.

A. J. WELLS, tenant in possession, plaintiff in error, vs **D. A. WALKER**, guardian, lessor, defendant in error.

[1.] The defendant introduced a deed purporting to be the deed of E. S. After the evidence had closed, the plaintiff offered a witness, to prove the deed a forgery. The defendant objected to the proof, insisting, that it came too late; and, if not, that there was better evidence, namely: that of the subscribing witnesses; and also that the proposed evidence was irrelevant.

Held, That the objection was not good.

2.] The principle, that a *bona fide* purchaser, without notice, is protected, applies only where the legal title is in one person, and the equitable title in another.

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Ejectment, in Gordon Superior Court. Tried before Judge Crook, April Term, 1859.

This was an action of ejectment by Doe, *ex dem.*, Dawson A. Walker, guardian of the minor children of Amos Lane, against Roe, casual ejector, and Andrew J. Wells, tenant in possession, to recover lot of land No. 282, in the 13th district and 3d section of originally Cherokee now Gordon county.

This case has been before this Court on several occasions heretofore, and it is unnecessary to set out its facts minutely (See 26 *Ga. Rep.* p. 390.) And the points adjudicated will be fully understood from the opinion below pronounced by this Court.

The jury, under the evidence and the charge of the Court, found for the plaintiff the land in controversy and fifty dollars for mesne profits.

Whereupon, defendant moved for a new trial on the following grounds:

1st. Because the Court erred in admitting the testimony of J. A. W. Johnson, to prove that the deed from Berry Stephens to Absalom Holcomb was in the handwriting of Holcomb—Johnson not being a subscribing witness to said deed, and because said testimony was irrelevant.

2d. Because the Court erred in refusing to charge the jury as requested by defendant's counsel, that parol testimony may be admitted to explain a latent ambiguity in a written instrument, but they are to yield to such evidence only when it is entirely satisfactory; and in charging that no greater evidence was required in this case than in any other.

3d. Because the Court erred in refusing to charge as requested, "that a *bona fide* purchaser of land, without notice of fraud or defect in the title, will be protected;" but charged that although this was true, yet it did not apply to this case, and that if they believed that no such person as Berry Stephen's orphan lived in the 693d district of Dooly county, at the time that draws for the Cherokee land lottery were given

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in, and that the name given in for Berry Stephens's orphan, was intended for William H. Stephens, the orphan of Berry Stephens, then they must find for the plaintiff.

4th. Because the Court refused to charge as requested by defendant, "that in this case the list of persons who gave in for draws in the 639d district of Dooly county, would be higher evidence than parol proof;" but charged that the production of this list was only one mode of proving who gave in, but was not higher and stronger than parol testimony.

5th. Because the Court charged the jury, that if they believed that Absalom Holcomb *forged* the name of Berry Stephens to the deed from the latter to Holcomb, then the deed was void.

6th. Because the verdict was contrary to the charge of the Court.

7th. Because the verdict was contrary to the evidence and the weight of evidence.

The Court refused the motion for a new trial, and defendant excepted and assigns said refusal as error.

W. T. WOFFORD, for plaintiff in error.

D. A. WALKER, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court right in overruling the motion for a new trial? We think so.

The motion was placed on seven grounds. These will now be examined.

First ground. The defendant had introduced in evidence, a deed purporting to be the deed of Berry Stephens. After the evidence had been closed on both sides, and the Court had "directed counsel, to proceed to address the jury, the plaintiff moved the Court for leave to introduce J. A. W. Johnson, to prove" the deed, a forgery. Johnson was not a subscribing witness to the deed. The defendant objected to his

introduction—contending, that the offer to introduce him, came too late, and that, even if it did not, there was better evidence; namely, that of the subscribing witnesses. The Court overruled the objection, and that decision makes the first ground of the motion; in which ground, however, the defendant took the additional position, that the evidence of Johnson was irrelevant.

None of these grounds was, in our opinion, good. It is a matter of discretion with the Court, whether, after the evidence has closed, additional evidence shall not be received. And decisions, in matters of discretion, are not to be disturbed, unless they show abuse of the discretion. No abuse of discretion, is apparent here. The delay was inconsiderable; the defendant did not say, he was surprised, or ask for a continuance.

The deed signed, Berry Stephens, was already before the jury; it had been read to them, (it being probably a recorded deed,) by the defendant, as a part of his evidence. Therefore, it was to be considered and treated, as a deed subject to be attacked by the same sort of evidence by which, it would have been subject to attack, had it been read to the jury, on the evidence of its subscribing witnesses. And if it had been read to the jury on the evidence of its subscribing witnesses, it would, we may assume, have been subject to be attacked, by the evidence of any person acquainted with the handwriting of the person whose name was signed to it.

The testimony was relevant, if the deed was relevant, and the defendant it was who introduced the deed as evidence. That the evidence attacking the deed, was irrelevant, was, therefore, an objection that did not, if true, lie in his mouth.

[1.] So we think that none of the objections to the evidence, was good; and therefore, we think, that the first ground of the motion was untenable.

Second ground. It is sufficient to say, that if the evidence was "entirely satisfactory," the charge, if wrong, did no harm; the verdict would have been the same that it was, had the

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charge been what it was requested to be. What the evidence really was, we cannot tell, for, though it is referred to, as annexed to the bill of exceptions, it is not there annexed; nor is it to be found, elsewhere, in the record. It may be, therefore, that it was "entirely satisfactory;" and we must presume that it was, as the *onus* is always on him who alleges an error, to show the error.

Third ground. This ground consists of two parts, the refusal to give a charge requested; the charge given.

[2.] The request was, to charge the principle, that a *bona fide* purchaser, without notice, is protected. The Court said, that this was a principle which did not apply to the case, and refused the request. Did the principle apply to the case? Clearly not. This principle applies to a case in which, the legal title to the property, is in A., and the equitable title in B., and C. purchases the property from A. without notice of B's equitable title. But the present was not a case in which, the legal title to the land, was in Berry Stephens, and the equitable in Wm. Henry Stephens. If either of them had any title, he had the whole title, both legal and equitable.

The first part of the ground, then, was not good.

The charge was clearly right; no argument is needed, to show, that it was right.

So the second part of the ground was not good.

Fourth ground. There was no "list of persons who gave in for draws," in evidence. It was improper, therefore, in the plaintiff in error, to request any charge about such a list. And, for the same reason, the charge, as given, could do no harm, if wrong, provided the parol evidence was, in itself, sufficient to show, that Wm. H. Stephens, and not Berry Stephens, was the person for whom the draw was given in; and, as the plaintiff in error has failed to bring before us that evidence, we are bound to presume, that that evidence was sufficient to show, that fact. But we do not say, that the charge was wrong. We say nothing on the question wheth-

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er it was or was not wrong. It is sufficient, that it did no harm.

Fifth ground. We see no error in the proposition, that a forged deed is void.

Sixth and Seventh grounds. Much of the evidence not having been sent up to this Court, we are unable to say, that these grounds were true.

Judgment affirmed.

WM. W. ROARK, and others, executors of J. McMASTER, deceased, et al., plaintiffs in error, vs. GREEN B. TURNER, defendant in error.

- [1.] A defendant may be sued in the same action in his two characters, of executor of the maker of a promissory note, and of individual endorser.
- [2.] In a suit on a promissory note by the endorsee against the endorser, the recovery cannot be reduced by showing that the endorsement was made on a sale of the note for a less sum than that expressed in the face of the note and claimed in the suit. BENNING J. dissenting.

Assumpsit, in Fulton Superior Court. Tried before Judge BULL, April Term, 1859.

This was an action of assumpsit, brought by Green B. Turner, endorsee, vs. W. W. Roark and others, executors of J. McMaster, and W. W. Roark, and William Gilbert, endorsers, to recover the amount of a promissory note.

1st. Before the case was submitted to the jury, the defendant Roark moved to dismiss the case or compel the plaintiff to amend, on the ground, that the same person Roark could

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not be sued in the same action in two characters, to-wit: as executor of the maker, and individually, as endorser. The Court overruled the motion and defendant excepted.

2d. Plaintiff then moved to strike a plea put in by Roark, to the effect, that Roark had endorsed the note to the plaintiff on a sale of it, for a less sum than the face of the note showed due at that time, and praying that the plaintiff should be allowed judgment only for the sum he had paid for the note with interest thereon.

The Court sustained the motion, and defendant excepted. The plaintiff then took a verdict against all the parties for the full amount of the note.

HAMMOND & SON, for plaintiffs in error.

CALHOUN, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We are all agreed, that there is no difficulty in sustaining this action against Roark in his two characters, as executor of the maker, and as individual endorser. The judgment goes against him in the one character, *de bonis testatoris*, and in the other, *de bonis propriis*. We cannot see how any difficulty is created by the circumstance that both characters happen to be united in the same person.

[2.] Upon the other point, Judge BENNING dissents from a majority of the Court. I shall not at all discuss the common law authorities on this subject, because I think the question is settled by our statute of 1826—*See Cobb's Dig.* p. 594. That statute declares, that "whenever any person whatever endorses a promissory note or other instrument, he shall be held, taken and considered as security to the same, and be *in all respects bound as security*, until said promissory note or other instrument is *paid off and discharged*." It

is obvious that these words make an endorser liable to the *same extent* as a *surety*. Now, a *surety* is a maker, and is liable to the *same extent* as the principal. True, he is released by some things which leave the principal bound, but while bound at all, he is bound to the same extent with the principal. As much money as the principal is bound to pay, just so much is the surety bound to pay. It becomes necessary then for the plaintiff in error to maintain that the *maker* of a promissory note, whether principal or surety, is bound to pay the holder only so much as the note has cost him. And this position *is* taken, and is based upon the idea that the promisor is not bound beyond the extent of the consideration which he receives for the promise; that when the promise is to pay one sum, while the consideration is a less sum, all of the *excess* is without consideration, and is therefore not obligatory; that there must be an *equipoise of values* whenever the nature of the case admits of an exact equality between the consideration and the promise. If the consideration on *both sides* was money, this reasoning might do, for in that case an exact equipoise of values might be had; but the fallacy of the reasoning when applied to other cases, consists in assuming that in such other cases, equality of values is attainable. When a man gives his due-bill for a hundred dollars in consideration of only fifty dollars which he receives cash in hand, who can say he has necessarily made a bad trade? There are some men who would make exactly fifty dollars by every such operation which they could get a chance to perform. There are others who would lose fifty, and others still who would probably come out about even, for their estates after death (an event which might well happen before payment of their due-bills,) would pay about fifty dollars in the hundred. A promise is a species of property, a *chose in action*, and has no more a fixed money value, than a horse or a negro has. The value of each is a matter of judgment. It is not pretended that the law can ascertain the exact equivalent for a horse, and how

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can it ascertain the exact value of a promise? I understand the rule of law to be, that the obligation of the promise is not limited by the size of the consideration (where there is any consideration at all, as there is in this case) but only by its *own terms*. For the reason, that the law cannot weigh the value of the promise, it leaves the parties to adjust it by their *contract*. Where there is any consideration, the contract of the parties is the law of the case, unless the contract is against law. Now, there is no pretence that it is any more against law for the maker of a promissory note to pay the sum expressed in the note, than to pay what the note may have cost the holder. Then the *promise* is the thing which is to control, and the promise is to pay the sum expressed in the note; not what the note may cost the holder. This is the promise of every maker, surety as well as principal, and under our statute, an endorser makes the same promise. It is binding upon all of them to the same extent, and for the same reason; because it is their lawful contract. It will be observed that there is no question of *usury* in this case. Usury is what is paid or promised for forbearance of day of payment; for giving day of payment; but here the endorser did not have the element of *time* in his contract; he simply endorsed or backed or guaranteed another's contract as already made. The contract is confessedly untainted with usury, and is a lawful contract which binds the endorser, in the language of our statute "till the note is *paid off* and *discharged*."

Judgment affirmed.

BENNING J. dissenting.

One of the judgments of this Court, is, that the decision of the Court below, overruling the plea, was right. From that judgment, I dissent. I think that the plea was a good plea.

Roark was the immediate endorser of Turner, the plaintiff

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below. There was then a contract of endorsement as between them two. The note endorsed was for \$1,950. The plea was, that Roark did not receive for his endorsement, as large a sum as \$1,950, by about \$200.

The endorsement amounted to a promise by him, to pay \$1,950, in consideration of receiving \$1,750. Now I say that, for this promise, there was a want of consideration, to the extent of \$200. . The case differs in no material respect, so far as I can see, from the case in which, the maker of a promissory note, makes the note for \$1,000, and receives from the payee, only \$500. In each case, it is equally true, as it seems to me, that there is a partial want of consideration for the promise.

And whenever there is a partial want of consideration for any promise, the promissor may plead it, to a suit on the promise, brought by the promisee. This is a general principle, which, I may, I suppose, assume.

But not only is the plea supported by this general principle; there are a number of decisions by which, it is supported. Some of these I will give, as stated in the notes to Chitty on bills.

"*Darnell vs. Williams*, 2 Stark Rep. 166. Payee against acceptor of a bill for 19*l*. 12*s*. Defendant proved, that he had value for only 10*l*, and that he accepted for the rest, to accommodate the plaintiff. And, per Lord Ellenborough, though this, as to third persons, is a bill for 19*l*. 12*s*; yet as between these parties, the acceptance is for 10*l* only; and that sum having been paid before the action, he nonsuited the plaintiff." (*Chitt. Bills*, 81 Note i.)

So, in the present case, Roark having had value for only \$1,750, is to be considered with respect to the other \$200, as an endorser for the accommodation of Turner the endorsee. If he had had value for no part of the \$1,950, that he would have been an accommodation endorser, for Turner, as to the whole \$1,950, none I suppose will dispute. The difference

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in the two cases is only one of degree. At any rate, we must say, that he was an endorser without consideration, as to the \$200.

"*Barber vs. Backhouse*, *Peake Rep.* 61. In an action on a bill of exchange, by the payee, the defendant paid part of the money into Court, and it appeared upon the trial, that there was no consideration for the other part; Law, however, urged, that the payment of the money into Court, admitted the bill was good for part, and if it was good in part, it was good *in toto*; but Lord Kenyon declared himself clearly of a contrary opinion, upon which, the jury found for the defendant, and this case being afterwards mentioned by Lord Kenyon, in the course of argument, Law said he was perfectly satisfied with the decision." (*Id.* 83 *note y.*) In this case, the defendant was, it is likely, the drawer; and an endorsement, our case, is but a new drawing in favor of the endorsee, as payee.

Strongly to the same effect, are *Weffen vs. Roberts*, (1 *Esp. Rep.* 261, *Chit. Bills* 81, *note k*;) and *Jones vs. Hibbert* (2 *Slark Rep.* 304, *Chit.* 81, *note k.*)

These cases and others, of the same import, are, I believe, cited as authority, in *Story on Bills*; *Byles on Bills*; and *Bailey on Bills*. They and the general principle aforesaid, show, I think that the plea was good.

It is to be remembered, that the case is not that of a *sale* of the note, without recourse on the seller. It is the case of a sale with recourse on the seller, a sale accompanied by his promise to pay the note, if the makers did not pay it. This promise makes the difference. Doubtless, if the owner of a note sells it without recourse, for less than it calls for, the purchaser acquires a title to all it calls for, and is not, when he collects it from the maker, liable to pay to the seller, the difference between what he paid the seller, and what he collected. In that case, although the amount paid for the note, is less than the amount it calls for, yet the purchaser takes

the risk of the maker's solvency; the risk of his having defences, &c. Consequently, it is not a case in which the seller can say that there was any want of consideration. Even in that case, however, great inadequacy of price, might be a badge of fraud, which would justify the nullification of the sale. But if he not only sells the note, but promises to see it paid, there must be a full consideration for that *promise*—to make the promise bind him, to pay the whole of the note; that is to say, there must be a consideration equal to the face of the note. So I think. Hence I dissent as aforesaid.

ATLANTA AND LA GRANGE RAILROAD COMPANY, plaintiff in error, vs. LOVICK P. HODNETT, defendant in error.

- [1.] Where a party rescinds a contract on account of fraud and seeks damages also, his measure of damages is, not an equivalent for the violation of parts of the contract by the other party, but it is an equivalent for the hurt he has received from being inveigled into the contract.
- [2.] Where a party seeks damages for the violation of a contract by the other party, the measure of his damages is, not what he has suffered by performing his part, but what he has suffered by the failure of the other party.
- [3.] Only those sayings of an agent are admissible against his principal, which are spoken concerning his principal's work, and while he is doing the work—*Dum fervet opus.*

In Equity, in Troup Superior Court. Tried before Judge CABANISS, at May Term, 1859.

This was a bill filed by Lovick P. Hodnett, against the Atlanta and LaGrange Railroad Company, to recover of said company damages sustained by reason of the failure and refusal of the company to build the necessary bridges and crossings over said road, on the premises of complainant,

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and to erect a depot and turn-out thereon, as said company promised to do, in consideration that complainant would grant and convey to it the right of way through his said land. The bill further seeks to recover compensation for injury and damage done to his plantation, and for losses, trouble and expense sustained and incurred by him, on account of obstructions to his roads in and through his plantation, and of ponds and lagoons caused by the construction of said road.

Defendant answered the bill, denying its material allegations, and insisting that the deed conveying the right of way, expressed the true and only consideration for the grant thereof by complainant.

The jury found for complainant thirty-four hundred and seventy-nine dollars. Whereupon defendant moved for a new trial upon the following grounds:

1st. Because the Court erred in not dismissing said bill on motion of defendant.

2d. Because the Court erred in admitting parol evidence to show any consideration for the deed of complainant to defendant, other than expressed in said deed; and also in admitting evidence tending to prove a contract on parol between the parties.

3d. Because the Court erred in permitting the witnesses to testify to their opinion of the damages in the form and upon the basis disclosed by the brief of the evidence.

4th. Because the Court erred in admitting all and every part of the evidence tending to show the value of the right of way conveyed by complainant's deed.

5th. Because the Court erred in admitting all and every part of the evidence tending to prove the sayings, speeches or declarations of Judge Hill, or any other person.

6th. Because the Court erred in admitting the evidence of Samuel Curtright, and particularly that part of the same

showing an admission by Douglass of an obligation upon defendant to build a bridge, &c.

7th. Because the Court erred in not ruling out all evidence of the contents of any letter written by Judge King.

8th. Because the Court erred in not withdrawing from the jury, and ruling out, upon motion of defendant, all evidence as to the sayings, speeches or declarations of Judge Hill.

9th. Because the Court erred in not compelling complainant to elect, before counsel on either side addressed the jury, whether he would proceed for a rescission of the alleged contract, or for the enforcement thereof.

10th. Because the Court erred in refusing to charge the jury, as requested by defendant, that in estimating complainant's damages for breach of contract, they (the jury) should not include as a part thereof the value of the right of way conveyed by the deed.

11th. Also, on refusing to charge the jury, as requested, that nothing could be allowed in damages for failure to furnish free ticket and turn-out; and in charging in place thereof in general terms that no damages not proven could be allowed.

12th. Also, in declining to state to the jury, at defendant's request, what is the measure of damages in this case; and in stating and on charging that the jury, in the event that they found for complainant, should allow all damages proven to have been sustained by complainant in performing his part of the contract, and in consequence of a failure of defendant to perform its part.

13th. Also, in refusing to charge the jury, at defendant's request, that the measure of damages in this case, in the event that they should find for complainant, is the cost of building and keeping up the bridge and crossing to the present time, during the period the defendant has been in default.

14th. Also, in refusing to charge, as required, that it was the duty of complainant to use reasonable diligence and

prudence to prevent damage to himself by reason of defendant's failure to build and keep up the bridge and crossing; and that if he could have built and kept up the same at less damage and expense than would accrue in consequence of the absence of said bridge and crossing, it was his duty to have done so.

15th. Because the verdict of the jury is contrary to law, contrary to evidence, and strongly against the weight of evidence.

16th. Because the damages found and decreed by the jury are excessive.

The Court refused the motion for a new trial, and defendant excepted.

FERREL & BULL; E. Y. HILL; and OVERBY & BLECKLEY, for plaintiff in error.

B. H. HILL, and B. H. BIGHAM, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] Mr. Hodnett by his bill, makes two cases. The first is, that his deed of the right of way, was procured by *fraud*; and his specification of fraud is that the company induced him to make the deed by certain *parol* promises, which, *from the beginning*, they fraudulently intended to break and which they have never performed. Is this a case entitling him to relief? Does it not fall under that wise and well-settled rule which excludes *parol* evidence intended to vary a written contract, by either taking from it or *adding* to it? Does not this rule require that all *promises* on which the parties *rely* should be put into the writing, when there is a writing, professing to set forth the contract on *both sides*? Where there is no *reliance* or confidence, there can be no fraud. The question I ask is, whether all *promises* on which the parties

rely must not be in the writing. I do not mean *representations*. These last relate to the truth of existing or passed facts, and not to engagements in the future; but promises, if they are to have any efficacy, must have it in the future; they are an undertaking, a *contract* and the rule requires *all* the *contract* to be in the writing. What of the contract is not there, *does not exist*; it is waived, discarded, merged. This view I suggest as a difficulty in my own mind, and not as a decision of the Court nor as a settled opinion of my own. So far the bill. How does this branch of the case stand on the proof? The only evidence that these promises were false and fraudulent in their inception, is the fact, that the company being able to perform them, have not done so. It was said in the argument, that the jury must be left to infer from the circumstances of the case, whether or not these promises were from the first, intended to be performed, or only made to deceive and defraud. But are there any "circumstances" about the case, except the power to perform coupled with a failure? Is this enough to *authorize* the conclusion? To say so, seems to me to be a mere *evasion* of the rule to which I have just referred. A man receives promises, acts on them, relies on them, and then puts in writing the contract on both sides, but leaves these out; *intentionally* leaves them out. The rule debars him from *enforcing* them, but he gets the full benefit of them notwithstanding, for he has only to show that they were made and would have been, but in point of fact, have not been performed. Does this make a case for relief? This view also, I propound as a difficulty, and not as a settled opinion. It is a point on which the Court desired to *see* authority, but none was produced. But if relief, *what* relief does this case authorize? Surely not damages for a *violation of the contract*. The case now under consideration is that the *contract* is truly contained in the writing, but was fraudulently procured by false dealing at the time. The effect of this, would be to *vitate*, to *avoid* the contract, and to give damages for the injury done by its performance, and

not by its violation. In this view, there is no violation of the contract. When a man has been inveigled into a contract by fraud, he may rescind it or adhere to it as he pleases. If he adheres to it, he takes it as *it is* and not as he *might have made it*, with different information. If he rescinds it, he is entitled to compensation for all the hurt he has received *from the contract*; not from its violation. And it might happen, that he would be entitled to no damages at all, (except nominal,) for it might well happen that the contract, *though* procured by fraud, does him more good than harm. Mr. Hodnett's damages, in this view of his case, would be something or nothing, according as the railroad has done his plantation more harm or more good; considering on the one side the inconvenience to him in carrying loads from one part of his plantation to another, the ponding of his land, and the deprivation of that part of his land covered by the right of way; and on the other side, the increased facilities of reaching a market, and of personal travel, the draining and reclaiming some of his swamp lands, and the general enhancement of the value and price of lands, his included. In other words, would his plantation bring more money as it is, or with the *railroad destroyed*? The rule of damages laid down by the presiding Judge, is not conformable to the proper measure in this view of the case. But Mr. Hodnett presents another case. He says that the contract is not all in the deed, but that the *parol* promises of the company form a part of it and he asks damages for a violation of *that* part of the contract. To me, this seems a clear and palpable violation of the rule excluding parol evidence to vary a written contract. I am aware that the rule has been so construed, or to speak the plain truth, so *relaxed*, as to allow *parol* proof of an additional or different consideration for a deed, when that expressed in the deed itself, is a mere pecuniary one. But the relaxation has gone no further, so far as I am aware, and I trust it never will. Here the deed is an indenture, professing to set forth the contract on *both sides*. Hodnett

conveying the right of way, and the company (not paying him mere money as a consideration lent) engaging to run their road through his land. Surely he was bound by the rule I have mentioned, to put into the writing all the stipulations on which he relied as a part of the *contract*. If the rule don't require this, it is no rule, and the Courts ought to say frankly that they do not recognize it. This case seems to me, to be put out of all doubt by the *condition* in the deed. Out of all the promises which he says the company made, he *chose* to set down in the writing, but the one that they should run their road through his land, and he put it as a condition in the deed, that if they should fail in *that* promise, the contract should be void, but if they should perform *that one* promise, the contract should be good. They have performed it. He admits too, that the deed was written exactly as he intended it to be, and as it was agreed it should be. He does not pretend that it ought to be *reformed*, so as to conform to what the parties intended it should be; but he seeks to superadd to it other promises, other conditions lying in *parol* only, and never meant to be in writing. In presenting this view, I do not speak for my colleagues, for I understood they were not satisfied on it. But we were all agreed that the rule of damages as laid down by the presiding Judge, whether applied to this view of the case, or to the first one, is erroneous. Indeed, the presiding Judge seems to have *mixed* the two views together in fixing a measure of damages. He told the jury they must find all the damages which Hodnett had sustained by his *performance* of the contract, and also, all he had sustained by the company's *violation* of it. Now I think it is clear, that if he is entitled to damages at all, he must either *repudiate* the contract and ask damages for having been inveigled into it; not for its violation; or else, adhering to the contract, he must ask damages for the company's violation of it, and not for his own performance of it. If he adheres to the contract he is *bound* to perform it, and certainly is entitled to no damages for having done

so. His remedy in this case is, to make them perform as he has done, or pay him an *equivalent* for their failure. And in this view he is not entitled to any compensation for his right of way. *That* passed by the *contract*, and if the contract stands and is *enforced*, they must pay for it, not what it was worth, but what they *agreed* to pay, or having failed in this, they must pay an equivalent, not for the right of way, but for what they agreed to do, but have failed to do. We think too, in this view of the case, (if he is entitled to relief at all) a Court of Equity may look to the future, and award such damages as will enable him to do for himself, those things which the company agreed, but have neglected to do for him; that is, to give him an equivalent for the future performance, as well as the past failure.

[2.] What is such an equivalent? We think it is the cost which a discreet man would, in *Mr. Hodnett's circumstances and situation*, have incurred, in remedying the inconveniences which the company engaged to obviate in the past, together with such a sum as will obviate them in the future. For myself, I will add that there is a clear limit beyond which it seems to me the damages can not go. What is Hodnett's whole place worth, with no obstruction to communication between all its parts? Then, with the two hundred acres beyond the railroad cut off, what would the remaining part be worth? This difference, lessened by what the two hundred acres in a separate state would bring, forms a limit beyond which the damages can not go, for if the cost of keeping up communication between the different parts would be more than this, a discreet man would have abandoned the attempt to keep up such communication, and have sold the two hundred acres. It may be said that would leave him too little land for his force, or would leave him without timber, &c.; but all these are elements in estimating what the remaining land would be worth with the two hundred acres cut off. I do not say that the damages ought to come up to this limit, for it may well be, that they do not.

When he undertook to remedy the inconvenience, he is entitled to charge, not what his remedy actually cost him, for his remedy may have been a very unwise and absurd one, but what would have been the cost of the *best* remedy which his circumstances and situation allowed.

[3.] The admissibility of complainant's evidence, is the only other point needful to be mentioned. Of course, none of the *parol* evidence touching the sayings of the company's agents was admissible, if the doubts and difficulties which I have suggested against Mr. Hodnett's whole case, are well founded. But assuming even that they are without foundation, we all think there was error in admitting this testimony. The rule we think is clear, that only those sayings of an agent are admissible against his principal, which are spoken while he is doing his principal's work, and are spoken concerning the very work he is doing. *Dum fervet opus*. The principle on which they are admitted at all, is that they constitute a part of the *res gestæ*; a part and parcel of the very thing the agent is doing when he utters them. The only agent whose sayings in this case are admissible, is McLendon, who *took the deed*. That was the main fact, and whatever was done or said at that time, in relation to *that matter*, stands on different grounds from the sayings of others. And we think too, that as McLendon and Hodnett were both in the public meeting and went right out of it, and executed the deed, McLendon may be considered as having *adopted* the promises which he had heard, and which he knew Hodnett had heard and made for the railroad company. Hence, we think the sayings in that meeting were admissible, if indeed any *parol* evidence was admissible. But we think all the other *parol* evidence of agents' sayings was clearly inadmissible under any view.

[4.] I have not considered all the assignments of error *seriatim*, but I have adverted to principles which cover them all. Counsel are now informed at what points the pressure lies, and we trust that they will another time produce to us

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authority on the points where I have indicated it to be needed, should this case ever come before this Court again.

Judgment reversed.

ALBERT J. LINGO, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] It is not error for the Judge to refuse to have talesmen again called in making up the panel in a criminal cause, after he had ordered the Sheriff to direct each talesman to come into Court, and had had proclamation made, that all talesmen were required to come into Court.
- [2.] Threats by the deceased are not admissible in evidence when they were unknown to the slayer, and where the deceased did nothing in the conflict except to defend himself.
- [3.] Communications between husband and wife are protected from disclosure, even after the relation has ceased.
- [4.] That which is perfectly justifiable on the part of the deceased, cannot be any legal provocation to the slayer.

Murder, in Cobb Superior Court. Tried before Judge RICE, at March Term, 1859.

Albert J. Lingo, the plaintiff in error, was indicted for the murder of Robert Duncan. He pleaded not guilty, and the case came on for trial at March Term, 1859.

In making up the jury, after the first panel of forty-eight had been exhausted, the Judge ordered the Sheriff to summon a second panel of talesmen, and to notify them as he summoned them, to come into Court. The Sheriff, after summoning the requisite number, reported their names to the Judge, who ordered proclamation to be made at the door for all persons thus summoned as tales jurors, to come into Court. The Clerk made out a list of the panel which

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was furnished the prisoner's counsel, and called over the names thereon, before the panel was put upon the prisoner. Two of the persons summoned as tales jurors, and whose names were on the list, and numbered thereon 32, and 33, failed to answer when called. The Judge ordered a fine upon them and directed two others to be summoned and put in their places. Counsel for prisoner objected, and requested that the two absent jurors be called at the Court-house door by the Sheriff. This the Court refused to do, and counsel for the prisoner excepted.

The judge remarks, in relation to this exception, that the jury of twelve men, who tried the prisoner, was made up and completed before numbers 32 and 33 on the panel, were reached.

The jury being made up, the following, in substance, was the evidence on the part of the State.

Elisha H. Lindley testified, that at Powder Springs, in the county of Cobb, on the 5th August, 1858, he saw prisoner and Robert Duncan, the deceased, at H. J. Hopkins's grocery. When witness got down to the grocery, Duncan came out at a door at the east end of the house, by the side of the chimney, and prisoner came out into the piazza fronting the street; about that time witness stepped into the piazza and Duncan was at the end and attempted to step in and called on witness, to witness that he had been running from prisoner, and that he did not intend to run any more; at that time prisoner made towards Duncan, and witness spoke to him and told him to stop, and that he was about to get into a serious difficulty. Prisoner made no reply, but made at Duncan, who commenced giving back; prisoner continued to press on him; Duncan told him if he rushed on him he would shoot him; made that remark to prisoner several times; prisoner replied, "shoot and be damned, if you do I will kill you." Prisoner had his stick behind him, under his coat tail; Duncan retreated, prisoner pursuing him about thirty yards, when deceased said to him, that if he

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followed him three or four steps further (witness does not remember which) he would shoot him; prisoner continued to advance, when Duncan shot at him; both were moving at the time; Duncan retreating and prisoner following, when Duncan shot. Duncan said several times to prisoner, that if he followed him further he would shoot, and prisoner replied to shoot, and be damned. The pistol that deceased had was a small single barrel one, four or five inches long in the barrel. After deceased shot at the prisoner he started and ran as fast as he could, and prisoner ran after him; as prisoner started to run he drew the spear out of the stick which he had in his hand; deceased ran, and prisoner after him, around behind Dr. Reynolds's blacksmith shop, and they then were out of witness's sight. When prisoner drew his spear, and started after deceased, he said "God damn you, I have got you now," or "God damn you, I will have you now." Witness went round behind the shop as soon as he could, and when he reached the parties, deceased had prisoner by the hair with his left hand, and with his right hand had prisoner by the coat collar; prisoner held deceased by the shoulder; they had hold of each other; saw no weapon then in the hands of either; witness took hold of prisoner, and A. J. McCurdy took hold of Duncan, and they tried to pull them apart, but Duncan held on so tight that witness spoke to him several times to let go; we got them loose, and Duncan walked off a few steps and began to reel like a drunken man; witness still held prisoner, and the spear was lying on the ground; witness and prisoner both grabbed at it at the same time, but witness got it; *did not* see any blood on the spear; Mr. Keser was standing by, and witness asked him to hold prisoner so that he could go and see what was the matter with Duncan; he had fallen down on the ground; witness went up to him and saw that he was dying; witness then said to Keser, that prisoner had killed Duncan; prisoner replied, that he did not care a damn if he had. As Duncan fell, he said, that he was a dead man;

he did not speak while witness and McCurdy were parting them; he did not speak a word that witness heard after he reached them, except that he was a dead man, as before stated; he died in two or three minutes after he and prisoner were parted; afterwards witness, with others, opened deceased's shirt collar and bosom, and found a wound on his left breast a little below the nipple; the wound was small, and looked as if it had been made by the spear (now produced and shown in Court). This spear is the same that witness picked up at the place where Duncan was killed; it is about twelve inches long; deceased was carried into Drs. Cotton and Reynolds's shop; Dr. Reynolds and witness then took the spear and ran it into, or through the hole in deceased's shirt, where the wound was inflicted, to ascertain how far the spear ran into the body of deceased, and it passed about six or eight inches through the hole before it became tight. There was another wound on the body, two or three inches from the one just described, and was more around on the side; it was a small wound just through the skin. Prisoner was arrested; deceased limped a little; one leg had been broken, was a little shorter than the other. At the time deceased shot at prisoner they were about 12 or 13 feet apart; prisoner was not hit; saw Drs. Cotton and Reynolds probe the wound; they inserted the probe, and it went in some two or three inches; the wound bled but little externally as far as witness saw; believes that the wound caused Duncan's death.

Cross-Examined.—(The defendant's counsel exhibited a diagram, showing the situation of the house, and of the door described by witness.)

When deceased came around to the piazza, he had his pistol in his hand, and when he went to get up into the piazza, prisoner ran out and met him; by rushing towards deceased, witness meant that he walked pretty fast towards him; when prisoner walked towards deceased, deceased gave back; at that time saw no drawn weapon in prisoner's

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hand, but he had the stick with the spear in it under his coat tail; at that time prisoner made no effort to strike deceased, for he was not in striking distance, but was ten or twelve feet from him; as deceased retreated prisoner followed, and did not get nearer than 10 or 12 feet up to the time deceased shot at him; when witness saw prisoner come out of the house into the piazza, he seemed very much excited, and seemed to be mad; did not at any time see prisoner attempt to strike deceased, but only saw him running after him with the spear; saw deceased with a stick in his hand, but cannot say whether it was loaded with lead or not; the stick was about the size of the sword cane now shown in Court; thinks it was a hickory stick; deceased was a somewhat heavier man than prisoner; when witness and McCurdy separated them, the hickory stick and the sword cane were both lying on the ground at the same place; about the time that witness first went up to the piazza, he heard prisoner say to deceased, that he, deceased, had ordered prisoner's mother from his, deceased's house; witness has understood that deceased married a daughter of Pinkerton Lingo, and that she was a sister of prisoner; prisoner's mother is the reputed mother of Mrs. Duncan.

A. J. McCurdy, on the part of the State, testified in substance, that he was at Powder Springs, on the day that Robert Duncan was killed; saw prisoner about a half an hour before the difficulty in which Duncan was killed; prisoner was in the tenpin ally rolling tenpins; Duncan came in and spoke to all of us who were in the ally, and then turned round and started out, when prisoner spoke to him, and said that he wanted to see him before he left; Duncan replied "very well," and walked off down the street to Mr. Hopkins's grocery; prisoner stopped rolling, and put on his coat and picked up his stick, and walked up to witness and pulled the spear out of the stick four or five inches, and told witness that he allowed to whip that damn rascal (referring to Robert Duncan); wit-

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ness told him that he had better not; prisoner then went out, and went down to the grocery; Duncan was then sitting in the piazza; the fuss between prisoner and Duncan then commenced; witness and Elisha Lindly went down and told prisoner that he had better stop, and have no fuss with deceased; prisoner then rushed on, following deceased up, until he came opposite to Mr. Megell's store; as deceased was leaving the grocery, he called on Mr. Lindley and Mr. Hopkins to take notice of what was going to happen; that if prisoner rushed on him he would shoot him; prisoner cursed him and told him to shoot; when deceased got up opposite Megell's store, as above stated, he shot at prisoner; deceased was rather giving back, and prisoner rushing on him at the time; prisoner had his stick (the one now produced in Court) under his coat behind, at the time deceased shot, and as soon as the pistol fired, deceased ran, and prisoner drew the spear out of the stick, drawing it in his right hand, took after deceased; prisoner pursued him around below Dr. Reynolds's shop and overtook him; the parties struck a lick or two with their sticks, and prisoner got deceased round the neck with his left arm, and struck him two licks with the spear; prisoner then threw him, and deceased turned prisoner, and by that time Mr. Lindley and witness got there and parted them; witness took deceased off two or three steps, and deceased asked him to let him get his stick; witness let him go that he might get his stick, and when he let him go, he saw that he was falling, and took hold of him and laid him down on the ground, and he died in about two minutes.

Henry J. Hopkins, on the part of the State, testified in substance, that he was setting with Robert Duncan, in the piazza of his, witness's, grocery house; they were talking; prisoner came out of the tenpin ally, and came up to within four or five steps of where witness and Duncan were sitting, and said to Duncan, "let us go and take something to drink;" Duncan replied "no, that he had quit drinking;"

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prisoner replied, "the hell you have;" prisoner then said to him, "God damn you, you want to drive my mother off again;" and witness thinks that he then placed his hands behind under his coat, and walked off pretty near to the piazza, and as he came up, Duncan rose up, and as he rose drew his pistol and told prisoner to stop; that he would hurt or shoot him if he rushed on him; prisoner, when he came up had the sword cane in his hand; deceased gave back and retreated into the house, and told prisoner to stand back, and that he would shoot him if he rushed on him; prisoner, with his sword cane in his hands behind him, said, "shoot, God damn you, shoot," and that he "would put six holes through" him; Duncan retreated, and backed out at the back door; after he went out at the back door; prisoner turned and came back through the house into the piazza, and Duncan came round the house, to the end of the piazza; prisoner again made towards him, and deceased gave back, and asked Elisha Lindley to bear witness that if prisoner followed him to Florence & Megell's store house, that he would shoot him; prisoner made no stop, but rushed right on deceased, saying, "shoot, God damn you, shoot," at the same time having his hands behind him under his coat tail; when deceased arrived in front of Florence & Megell's store, which was thirty or forty yards from the place they started from, he rather halted, and prisoner came up within about five steps of him; deceased rather stepped back, and said to prisoner, that if he did not stop he would shoot him; deceased had his pistol in his hand, holding it rather up; prisoner did not seem to stop, and deceased brought his pistol over towards prisoner and fired at him; prisoner all the time saying, "shoot, God damn you, shoot." As soon as deceased fired, he broke and ran, and prisoner, with his sword cane in his hands behind him, pulled out the spear and took after him as fast as he could run, saying, "O God damn you, I will get you now;" they run some fifteen or twenty steps, and got between two houses, where witness

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could not see them ; witness went down to where they were, and as he got there Lindley and McCurdy parted them ; deceased could not have gone more than seven or eight steps further in that direction, before coming to a high fence ; there was a gully there, and the parties were near it when they were separated ; after they were separated Duncan walked off four or five steps, and dropped down in a little gully, and died in four or five minutes.

Cross-Examined.—Prisoner was not on the steps of the piazza, but out on the ground, when he said to deceased, “you want to drive my mother off again, God damn you ;” did not see prisoner have any pistol ; he did not follow deceased quite to the back door, but went near to it ; deceased could have gone across to Florence & Megell’s store without coming around by the piazza, and it would have been nearer ; deceased had his pistol in his hand when he came round to the end of the piazza ; when he started off to Florence & Megell’s store he was cursing the prisoner some, but witness does not recollect the language used ; did not see prisoner draw any weapon, or attempt to strike deceased at any time before deceased shot at him ; does not think that prisoner was ten steps from deceased at the time deceased shot at him ; after the difficulty, witness saw the fore-finger of one of prisoner’s hands, and it looked as if it had been cut or bit ; it was bleeding a little ; the finger was hanging by the skin ; when deceased shot at prisoner he rather threw up his hand ; don’t know which hand ; did not see prisoner with any other weapon than the sword cane.

Re-examined.—Thinks that at the time deceased shot at prisoner, he had his hands with his cane behind his back under his coat.

Daniel Diggs testified, that the first he knew of the difficulty he heard a fuss, and the next thing a pistol fire, and then deceased and prisoner came running by where he was, and when deceased came near to witness, he turned his

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head to look back, and fell full length on his back; there was a little gully there that threw him as he was looking back at prisoner; prisoner then bounced on him with his spear, and stuck it into him about an inch and a half below his left nipple; at the time prisoner stuck his spear into deceased he was lying on his back at full length, with his hands up as if to prevent prisoner from striking him; then deceased and prisoner rose and clinched each other, and then fell and scuffled about over one another; it looked as if deceased was trying to get away from prisoner, while prisoner was holding him; then Mr. McCurdy and Mr. Lindley started to part them, and about the time they took hold of prisoner and deceased, they rose to their feet; after they were parted, deceased walked off three or four steps and fell; they then examined him, and found that he was badly hurt, and was dying; deceased then lay down and died right off.

Cross Examined.—Witness had seen prisoner that day in the ally, but had not seen deceased until he saw him running, and the prisoner after him; the first he saw was after the firing of the pistol; saw prisoner stab deceased one time, and then they rose to their feet and clinched; deceased made no attempt to fight; never struck prisoner with a stick; after they rose the last time they knocked one another; witness did not swear before the Coroner, that he “saw prisoner and deceased at the back door of Hopkins’s store, and deceased retreating and went to the piazza, and prisoner walked to the front to meet him,” &c. Witness also states, that if he swore at the same time, that “Duncan fell in the act of turning,” he don’t recollect it; did not say in the presence of William Foster and Mathew Lingo, that he knew nothing about the case; neither did he say that he did not see prisoner stick his spear into deceased.

Martin West, on the part of the State, testified, in substance, that a few days before the killing he heard prisoner say, in reply to a remark made, that he had better not under-

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take to whip Robert Duncan, "that he did not expect to undertake to fight him a fair fight; that he expected to be prepared for him whenever he should meet him;" that in reply to a remark, that it would be something if they went to Marony's and got a whipping; (Marony's was the place where there was to be a shooting match, and where prisoner spoke of going, and expected to meet deceased) prisoner said that he "would whip or kill, or be whipped or killed." Prisoner, on the Sunday evening after this, told witness, "that they had like to have had a right smart show over at Marony's on Saturday evening, and that if the right ones had been there they would have had it; that Duncan was not there, but some of his friends were there, and took up for him," and asked witness when the road working would come on; said that Duncan would be obliged to work the road, and that if he, prisoner, did not work, he wanted to be there any how; saw prisoner's fore-finger before the difficulty, and it looked like it had been mashed in the second joint, and told witness he had got it mashed; thinks it had got well; it was not tied up; it was crooked and looked smaller from the second joint than the other.

Cross-Examined.—Does not recollect that prisoner said he expected to meet deceased at the shooting match.

Pamelia Griggs, on the part of the State testified, that she was at Pinkerton Lingo's on Monday after the marriage of deceased and Frances Lingo, a daughter of Pinkerton Lingo, and sister of prisoner; prisoner and Matthew Lingo started to Hiram Mosely's, and prisoner took the sword cane, now in Court, in his hands, and said, that on that evening he would take Robert Duncan's heart's blood with that spear, and if he did not do it that evening, he would do it. The next Saturday evening after the above conversation, prisoner came to witness's house, and sat down in the door and sharpened the spear on the razor strop; same spear now in Court; this was in May, 1858; it was in the spring, and thinks it was in May.

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Cross-Examined.—Says she is not in a good humor with old Mr. Lingo, but has nothing against the prisoner.

Archibald P. Griggs, sworn on the part of the State, says, that about last May, in a conversation with witness about the marriage of his, prisoner's, sister with Robert Duncan; said something about the fuss they had about Duncan trying to bind him over to the peace, and that he had thrown Duncan in the cost; witness then told him that they were done with that, and advised them to quit it and be friendly; told prisoner he thought Duncan had done wrong, yet that his sister might have done worse than to have married him; prisoner replied that he had rather die and go to hell, if there was such a place, than to have it thrown up to him that his sister had married a horse thief; he then drew his spear and said, if Duncan ever crossed his path he would give him the contents of this.

Cross-Examined.—When witness spoke of deceased having done wrong, he alluded to his having taken Mr. Kaines's mule.

Dr. Cotton testified as to the wounds, and his belief is that it caused his death.

For the defence, Sarah F. Duncan, wife of deceased, but whose testimony was excluded, testified, that she was the wife of deceased, and sister of prisoner; she saw deceased load his pistol and shoot at a sapling; thinks it was about two months before his death; saw him shoot it several times; also saw him take a rifle, and follow on after prisoner, as he was passing along the road; this was in April or May, 1858; the rifle was John Duncan's; deceased borrowed a single-barrel shot gun in June, 1858; deceased borrowed a pistol, a revolver, of Allen Parrish, and Marion Duncan took it away, and witness saw it last in John Duncan's chest; deceased was very much displeased when he found that the revolver was gone; he was very angry. On the 4th August, 1858, witness saw deceased when he started to Powder

Springs; he carried the single barrel pistol with him; the pistol was loaded; the feelings of deceased towards prisoner were not good.

Cross-Examined.—Deceased carried a beef hide to Powder Springs the day he was killed there; he had killed a beef that day.

Re-examined.—Joseph Proner and George Proner were with deceased on the 4th August, when he went to the springs; was married to deceased 18th April, 1858, and was living with him at the time of his death.

Eppey Lingo, for the defence, testified, that on the 1st July, she went to see her daughter, Sarah F. Duncan, wife of deceased; when deceased came from work he called his wife into the other house, and when she came out she was crying, and deceased cursed witness, and told her to leave his house, and that quickly; witness replied "now Robert, what is the matter?" he said "God damn you, I want you to leave;" witness said to him, that she did not know that it was wrong for her to come to see her child; deceased then cursed Albert Lingo; witness told him that Albert was off attending to his business, and asked him what he had against Albert, and told him that Albert had nothing against him, and wanted to be friendly; deceased said he did not want her to name Albert to him; that he intended to kill him, and had the gun to do it with, and pointed to the gun; he said he was hurrying through his work, and when he got through he intended to kill the whole family; deceased followed witness to the house, and said he intended to kill the first one of the Lingos that passed the road; the road was a neighborhood road; he was a farmer; it was evening, and witness was sick, and told deceased she had a pain in her head, and had had it all day.

Cross-Examined.—Deceased married her daughter without the knowledge of the family, and they were not pleased when they heard it, but were willing to pass and be friendly; spoke to deceased when she met him; heard prisoner

say frequently that he wanted to be friendly with deceased, and she never heard him speak of him but in a friendly way.

The foregoing is the most material part of the testimony; other witnesses were examined, but it is deemed unnecessary to insert their evidence, as the facts of the case and points adjudicated, will be sufficiently understood from the above.

The jury found the defendant guilty, and his counsel moved for a new trial on the following grounds:

1st. Because the verdict is contrary to law.

2d. Because the verdict is contrary to the evidence.

3d. Because the jury found contrary to the charge of the Court.

4th. Because the Court erred in rejecting the testimony of Mrs. Sarah F. Duncan, the wife of deceased, going to show the declarations of deceased made to her, in connection with, and at the time of the acts sworn to by her.

5th. Because the Court erred in rejecting the evidence of Mrs. Duncan, the wife of deceased, going to show threats and declarations made by deceased to her.

6th & 7th. Because the Court erred in not ordering, or allowing the Sheriff to call the two absent tales jurors who had been summoned by him, as before fully stated.

The Court refused, and overruled the motion for a new trial, and in relation to the 4th and 5th grounds, states that the evidence of deceased's wife, as to the sayings and declarations of deceased, was rejected because it appeared that they were made in conversation between deceased and his wife while the relation of husband and wife existed, and while they were living together as husband and wife.

To which decision overruling the motion for a new trial, counsel for defendant excepts, and assigns the same as error.

SIMMS & LOCHRANE, for plaintiff in error.

Solicitor General PHILLIPS, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We do not think there was error in the constitution of the jury in this case. When the Sheriff had been ordered to give each talesman notice to come into Court as he summoned them, and then proclamation had been made at the door, that all talesmen were required to walk into Court; we think sufficient effort had been used to secure the presence of those who had been summoned. Besides, the prisoner had no right to have any particular persons on the panel. A complete panel of men who were all present, was the one put on him.

[2.] We think the evidence of Mrs. Duncan, respecting what her husband, the deceased, had said to her in the way of previous threats against the prisoner, was properly rejected, for two reasons. In the first place it was inapplicable to the case. There was no single act in the whole drama of the killing that could have been illustrated or modified by it. It was not proposed to show that these threats had been made known to Lingo. That would be a different case. How far these threats would have justified, or palliated his act, if he had acted on a knowledge of them, is one question; but it is a very different one where he knew nothing of them, and where the circumstances of the killing were such as to render it immaterial whether Duncan had made threats or not. Threats or no threats, he had a right to defend himself, and that was all he did. In the second place, this evidence was to be drawn from an illegal source, the wife, who was such when the declarations were made to her. The husband was dead, and so it is true that the relation had ceased when the testimony was offered; but communications between husband and wife are protected forever. This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and wife. Each must feel that the other is a safe and sacred depository of all secrets. And the protection

which the law holds over the dead, is the very source of greatest security to all the living.

[3.] But it is said the verdict was contrary to law and evidence, because the killing in this case was not murder. We are constrained to say that it *was* murder, long planned, and deliberately perpetrated murder. Lingo had declared he would have Duncan's heart's blood; at the time of the killing he commenced a quarrel and rushed on him; Duncan retreated, and warned him not to pursue; he did pursue with his hands behind him, and Duncan still retreated, and warned him several times that he would shoot him if he persisted in the pursuit; he did persist, and Duncan did shoot. The shot took no effect, and Duncan then fled, and Lingo exclaimed "now damn you, I've got you." He then pursued till he overtook Duncan, and plunged a spear into his heart. Most literally and fearfully did he accomplish his threat. Where is anything to justify this act, or to reduce it one shade below the crime of murder? It was admitted in the argument, that there was no provocation for the commencement of the attack, but it was suggested that the killing was induced by a provocation arising in the conflict; that Duncan's shooting at him was a provocation, that he did not begin the assault with an intent to kill, but only to whip, and that the intent to kill did not arise till the shooting had furnished an excuse for it. The fallacy in this argument lies in assuming that Duncan's shooting was any provocation at all. It was justifiable shooting. Whether Lingo had before that, intended to kill or not, he had at least tried to make Duncan *believe* that such was his intention, for he declared afterwards, that he had *held* his hands behind him to make Duncan believe he had a pistol. There was certainly ground to excite the fears of a reasonable man, and this was enough to justify Duncan in shooting. Lingo had himself rendered the shooting necessary to Duncan's self-defence; he had *intentionally* put himself in an attitude which forced Duncan to believe that his life was

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in danger. All that Duncan did was entirely justifiable, and could not, for that reason, be any *provocation*. But the case does not rest here. His own declaration above quoted, shows that his intent to kill had been formed *before* Duncan shot. For what reason did he wish to make Duncan believe he had a pistol? -It was in the expectation that he would shoot, and with the hope of destroying his aim, by putting him under terror. He proceeded with great nerve and skill. He counted upon his antagonist missing his aim, and being then in his power. He had the nerve to take the hazard, and the skill to render it harmless to himself. But why take this hazard? It was to get his victim in his power, and the use which he intended to make of his power is best shown by the use he did make of it.

Judgment affirmed.

LARKIN A. ALLEN, plaintiff in error, vs. MATHEW J. HOLDING, et al., defendants in error.

A bond for titles with the purchase money paid, is not good against a subsequent conveyance, to a purchaser for value who purchases without notice of the bond, and records his conveyance in due time.

In Equity, in Carroll Superior Court. Tried at April Term, 1859.

This was a bill filed by Mathew J. Holding against Larkin A. Allen and John Catlett, to enjoin an action of ejectment brought by Allen against complainant, for lot of land No. 3, in the sixth district of Carroll county.

The bill alleges, that Catlett was the drawer of said lot,

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who sold the same in 1828 or 1829, before the grant issued, to one Martin Berry, for thirty-five dollars, and that he executed a bond for titles, to be made when the grant should issue. That Martin Berry sold said lot to Jesse Berry, and gave his bond for titles. That on the 20th April, 1836, Jesse Berry sold the lot to John Dobson, and executed to him his bond for titles. That on the 14th March, 1839, Dobson sold said lot to complainant for a valuable consideration, and transferred and assigned to him Jesse Berry's bond for titles.

The bill further states, that on the 14th November, 1843, the said John Catlett again sold said land to Larkin A. Allen, and conveyed the same to him by a deed duly executed, of that date. The bill charges, that Allen had notice at the time he purchased, that Catlett had previously sold said land, and had given his bond for titles as aforesaid.

The bill further states that, on the 12th August, 1845, complainant sold said land to one Lewis Barton, who has had possession of the same ever since until recently, when, becoming dissatisfied, in consequence of the dispute about the titles to said land, and not having paid for the same, he has surrendered said land back to complainant, and that said Barton is now in possession only as the tenant of complainant.

The bill further states, that Allen has commenced his action of ejectment against said Barton, and that the same is now pending on the appeal.

The bill prays, that said action be enjoined; that complainant be quieted in his possession, and that the deed from Catlett to Allen be delivered up and cancelled.

Defendants answered to the bill, and the case was submitted to the jury upon the bill, answers, proof, and charges of the Court, who returned a verdict for the complainant. Whereupon, defendants moved for a new trial upon the following grounds:

1st. Because the jury found contrary to law and the evidence.

2d. Because the statute of limitations was a bar to complainant's right to a recovery. [Abandoned.]

3d. Because the Court charged the jury, that if they believed from the evidence that Catlett sold the land to Berry, and gave his bond for titles, and that Berry paid to him the purchase money, then, at that point their investigation ceased. That it was not material whether Allen had notice or not. That Catlett could convey no title to the land to a second purchaser, either with or without notice. That if a party sold land and gave his bond for titles, and received the purchase money before the deed was executed, that he could not convey a title to a second purchaser, even for a valuable consideration and without notice.

The Court overruled the motion for a new trial, and defendants excepted.

BURKE & BLACK; and WRIGHT, for plaintiff in error.

THOMASSON & FEATHERSTON, *contra*.

By the Court.—BENNING J. delivering the opinion.

Ought the Court to have granted the motion for a new trial?

Only one of the grounds of the motion, was insisted on, in this Court—the ground of the charge of the Court below. That is the only ground, therefore, which will be considered by this Court.

The charge was, that if "Catlett sold to Berry, and gave **him** bond for titles, and if Berry paid the purchase money, to Catlett, then, at that point, their investigation ceased; that it was not material, whether Allen had notice or not; that Catlett could convey no title to said land, to a purchaser, either with, or without, notice; that if a party sold land, and gave his bond for titles, and received the purchase money, before the deed to Allen was made, that he could not after-

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wards convey a title, even to an innocent purchaser for a valuable consideration." Was this charge right? We think not.

Both parties claimed under the drawer, Catlett; the complainant, by a bond for titles made by Catlett in 1828, or 1829, with the purchase money paid; the defendant, by a deed of conveyance made by Catlett in 1843, and duly recorded. The bond, then, was the older of the two instruments.

The question on the charge is this: If the purchaser by the deed, had no notice of the bond, when he purchased, is the bond, nevertheless, to prevail over the deed? And this question depends on another: Did the payment of the purchase money, by the purchaser under the bond, have the effect, both to transfer the legal title, from the seller to him, and to incapacitate the seller, from conveying the land, even to a person ignorant of the first sale, and who recorded *his* deed in due time? The charge of the Court assumes that it had this effect.

The Registry Acts say, that a younger conveyance duly recorded, shall prevail over an older not duly recorded, unless the donee in the younger, bought with notice of the older. This being so, if, in this case, the bond for titles, had been a conveyance, the younger conveyance would have prevailed over it, as the younger was duly recorded, and the donee in it, bought without notice of the older. And what is a bond for titles? It is an agreement, under penalty, to convey, and an agreement to convey, is not so strong, as an actual conveyance; and therefore, it would seem, that a younger conveyance that is sufficient to prevail over an older conveyance, ought to be sufficient to prevail over an older agreement to convey; for whatever is sufficient to prevail over the greater, ought to be sufficient to prevail over the less.

Again, the Registry Acts *mention* deeds of bargain and sale. If, therefore, a bond for titles with the purchase money paid, is a deed of bargain and sale, it is within the *words* of

the Registry Acts; and therefore, unless duly recorded, it will yield to a younger conveyance of any sort, duly recorded, the donee in which, purchased without notice of such bond. I think, myself, that such a bond is, a deed of bargain and sale. A bargain and sale is but an agreement, on a money consideration, to convey, not itself a conveyance—an agreement to convey which, if properly enrolled, was, by the statute of uses, turned into a conveyance. 2 *Black. Com.* 338; see *Dudley vs. Bradshaw*, decided at Macon, June, 1859.

And again; if, notwithstanding the payment of the purchase money, by the purchaser under the bond, the legal title still remained in the vendor, then on principles of equity, a subsequent purchaser of this legal title, without notice of the bond, would be protected against the bond. I rather think, myself, that on the payment of the purchase money, the legal title did pass to the purchaser. Such payment made the vendor, as it seems to me, stand "seized" of the land, to the use of the vendee; and if it did, then it was a case in which, the use was executed, by the statute of uses; a case in which the legal title and the possession were, by that statute transferred to the use. But, I also rather think, that, even if the use was executed, there still remained, under the Registry Acts, a *power*—a *capacity*—in the vendor, to convey the legal title, in a certain case; that is to say, in a case in which, the purchaser should purchase, without notice of the bond, and should duly record his conveyance. And that was perhaps this case.

Upon the whole, the conclusion, to which the Court came, is, that it is *not* true, that the payment of the purchase money under the bond for titles, had the effect both to transfer the legal title, from the vendor, to the purchaser, and to incapacitate the vendor from subsequently conveying the legal title, to a person ignorant of the existence of the bond, and who recorded his conveyance, in due time. The Court ~~thinks~~, that if Allen, the second purchaser, took a conveyance of the land, founded on a valuable consideration, with-

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out notice of the previous bond for titles, and recorded that conveyance, in due time, the conveyance had priority over the bond for titles. And, consequently, the Court thinks, that the charge was erroneous, and, that there ought to be a new trial.

There is nothing in *Peterson vs. Orr*, (12 Ga.) adverse to this conclusion. That was a case in which, the persons concerned were all parties to the bond for titles, not a case in which, there were two sales by the same person. No doubt a bond for titles with the purchase money paid, is good against the *obligor*. It entitles the obligee to the possession, as against the obligor; certainly, in equity; and if, in equity, then also at law, by the Act of 1820, which says, that if a party conceives, that he can establish his case, without resorting to the conscience of his adversary, he may sue at law, and shall not be compelled to sue in equity. And so this Court has repeatedly held. See *Dudley vs. Bradshaw*, *supra*.

Judgment reversed

ROBERT BUCHANAN, plaintiff in error, vs. FRANCIS M. FORD,
defendant in error.

MOORE & THOMAS, plaintiffs in error, vs. ROBERT BUCHANAN,
defendant in error.

A judgment in a matter of discretion, ought not to be disturbed, without a strong reason.

In Equity, in Cass Superior Court. Decisions at chambers, by Judge CROOK, May, 1859.

Napier et al. vs. Napier.

These two cases were heard and argued together, and the decision of this Court being predicated upon a general principle or rule of law, relating to the discretion of the presiding Judge or Chancellor, it is deemed unnecessary to state all the facts contained in two voluminous records.

AKIN, for Buchanan.

MILNER & PARROTT, *contra*.

By the Court.—BENNING J. delivering the opinion.

Dissolving or retaining injunctions is very much matter of discretion. We see no sufficient reason to justify interference with the way in which the discretion was exercised in these two cases. Therefore we shall not interfere. A judgment in a matter of discretion ought not to be disturbed without a strong reason.

Judgments affirmed.

SKELTON NAPIER, et al., plaintiffs in error, vs. THOMAS T. NAPIER, defendant in error.

A bequest to trustees in trust for a son and his wife and children, and then more specifically stated to be for "the use of, and support and maintenance of the said son and his family, and the support and education and *settlement* of the children"—is a gift to the children of the entire beneficial interest, *subject* to the support and maintenance of their father and his wife and family so long as the father and his wife and family may live.

In Equity, in Catoosa Superior Court. Decision by Judge CROOK, May Term, 1859.

Napier et al. vs. Napier.

This was a bill in equity, filed by Nathan C. Monroe and Skelton Napier, next friend of Thomas N. Maxwell, a minor, and son of Manfredona Maxwell, deceased, formerly Napier, and of James R. DeLauney, Mary B. DeLauney, Zachariah T. DeLauney and Virginia P. DeLauney, minor children of James L. and Sarah C. DeLauney, deceased, formerly Sarah C. Napier, against Thomas S. Napier. The object of the bill was to remove the defendant as trustee, appointed by the Court of Chancery, of certain property devised and bequeathed in the last will and testament of Thomas Napier, deceased, and for an account, &c.

Defendant answered the bill, and afterwards complainants amended their bill, stating that Eliza B. Napier, the former wife of defendant, had departed this life, and that under the decree made in Bibb Superior Court, that portion of the trust fund, amounting to about \$6,233, which had been set apart for her use during her life, returned to and became a portion of the original trust fund, for the purposes contemplated and provided for under the codicil to the last will and testament of said Thomas Napier, deceased, and that complainants are entitled to and have an interest in said fund. That said Thomas S. is incapable of managing said trust funds, and that he be removed and discharged from his trusteeship, &c. The amendment further states, that since the death of the said Eliza B., the said Thomas T. has intermarried with Mrs. Celia Price, and that he now sets up and claims, that his former wife having departed this life, that he is entitled to the whole of said fund, absolutely, as her heir at law, she having died without children; or, that under said codicil, it belongs to his present wife, for her support and maintenance during her life.

The codicil to the will of Thomas Napier, deceased, referred to and relied on in the foregoing amendment, is as follows:

"In relation to so much of my property and estate, real and personal, as is embraced in said bequests and provisions,

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and as would, by the same, if unrevoked, pass to my son Thomas T. Napier, I do hereby give, bequeath and demise said property and estate, and all and every part thereof, whether real or personal, to my sons, Leroy Napier and Skelton Napier, and my son-in-law, Nathan C. Monroe, as trustee, and in trust for my son Thomas T. Napier, and his wife and his children, Leroy Wiley Napier, Sarah C. Napier, Manfredonia M. Napier, and Thomas C. Napier, and any child or children of my said son, Thomas T. that may hereafter be born. The said trustees to be vested with the legal estate and full control of said property and receive the rents, issues and profits thereof, and to apply the same to the use of and support and maintenance of my said son Thomas T. Napier and his family, and to the support and education and settlement of the aforementioned children of my said son Thomas T., it being my will and desire that all the property that would have fallen to my said son Thomas T., under the aforementioned revoked bequests and provisions of said last will, should under this codicil vest in said trustees, in trust and for the use aforesaid forever."

To this amendment, defendant demurred. The Court sustained the demurrer and dismissed the amendment, and complainants except, and assign said decision as error.

D. A. WALKER, for plaintiffs in error.

J. T. McCONNELL; and W. H. MOORE, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

The question here is, whether the amendment to the original bill stated such facts as showed an interest on the part of complainants in the property mentioned in that amendment. The Court below sustained the demurrer to the

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amendment on the ground, that the facts stated, did not show an interest. We think otherwise.

We think that under the codicil to Thomas Napier's will, all of that property which under the original will would have gone to Thomas T. Napier, went beneficially to the children of said Thomas T., subject to the support and maintenance of Thomas T. himself, and his wife Eliza, and any family he might have, so long as he and she might respectively live. It is given in trust for Thomas T. and his wife, (who was then the said Eliza,) and his children born and to be born; and then it is more specifically stated to be for "the use of and support and maintenance of my said son Thomas T. and his family, and the support and education and *settlement* of the children." The word "settlement" is a controlling one. It indicates that the final disposition was a division among the children. It is not however a *remainder* in them after the death of their parents, for their "support" and "education," were *immediate* purposes, and the word "settlement," which conveys their largest interest, imports a provision for them, while their parents might be still in life. The *effect* then of the whole codicil was to vest the entire beneficial interest in the children, subject to the support and maintenance of Thomas T. and his wife and family as afore said.

It is not necessary to consider the full extent of the alterations made in this disposition by the decree in Bibb Superior Court, nor to consider the validity of that decree, for these questions were not argued. It is sufficient to say that even under the decree, that part of the property which was set apart to the wife Eliza, is now, by the terms of the decree itself, (she being dead,) to go back under the operation of the codicil. That is to say, in *that* part of the property, the complainants have the interest which has just been pointed out as being conferred by the codicil, the complainants being representatives of children. This is sufficient to retain the amendment without considering whether the divergence

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made from the codicil by the decree, as to the part assigned to Thomas T., is valid or not.

Judgment reversed.

EMILY S. CAMERON, et al, plaintiffs in error, vs. SENA S. CASTLEBERRY, et al., defendants in error.

Same vs. JOHN WEBB et al.

A case was referred to three arbitrators, in which, one of the defences was, the statute of limitations. The arbitrators on one piece of paper made an award in favor of the plaintiff in the case, and on another, a statement, that one of their number, dissented from the award, on the statute of limitations.

- [1.] *Held*, That, the last paper was to be received, as evidence on the question, whether the arbitrators had decided the defence of the statute of limitations.
- [2.] *Held*, secondly, That the paper being received as evidence, it showed, that that question had not been decided by the arbitrators, and, therefore, that the award ought to be rejected.
- [3.] In an arbitration, if evidence prejudicial to one of the parties, gets before the arbitrators, without the knowledge of that party, and is considered by the arbitrators, and the award is against that party, the award ought to be set aside.
- [4.] If one award is dependent on another, and the latter falls, it carries with it the former.

In Equity, in Troup Superior Court. Tried before Judge BULL, at May Term, 1859.

These two cases were argued together.

The first was a bill in equity, filed by Sena S. Castleberry, surviving executrix of the last will and testament of Edward Castleberry, deceased, and others, against Emily S. Cameron,

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administratrix, and Thomas G. Simms, administrator of James H. Cameron, deceased, for an account of the assets of the estate of said Edward, which went into the hands of the said James H. Cameron, deceased, as one of the executors of the last will and testament of said Edward Castleberry, deceased.

The cause being called, defendants moved to reject and set aside an award made in said case, by Benjamin H. Bigham, Samuel Reed and Benjamin H. Cameron, on the grounds:

1st. Because said arbitrators have not decided and made their award on all the points involved in said case.

2d. Because said arbitrators have not agreed on said award.

3d. Because said arbitrators had evidence before them on the part of complainants of which the defendants had no notice.

4th. Because the arbitrators exercised powers not delegated to them by the submission, in this, that they decided and awarded that the fees of the solicitors for complainants, should be paid out of the sum awarded to be paid to said Sena S. Castleberry, by the defendants, when no such question was submitted to said arbitrators by the order of Court, or the agreement of the parties.

5th. Because said arbitrators have in their award, committed an error, both in law and fact, as appears upon the face of said award.

It appeared, at the hearing of the foregoing motion, that the award was signed by all the arbitrators, and dated 19th March, 1859. During the argument a paper in writing, signed by all the arbitrators, dated 19th March, 1859, was read, which was as follows:

"In the case of Sena S. Castleberry, executrix, vs. Emily S. Cameron, administratrix, and Thomas G. Simms, administrator, we are of the opinion that the statute of limitations and the doctrine of stale demands, do not apply to bar a recovery in the case. We are convinced that there never

was any settlement, considered final by either of the parties, between James H. Cameron, deceased, and John T. Thornton, and N. G. Slaughter, or either of them. The receipts themselves show that another division was contemplated, in which the amounts then received were to be brought in. They do not express to be in full and the bonds given are not such as it is reasonable for parties to give, upon a final settlement, of what they think is all that is coming to them from an estate. They each contemplated, that it might be necessary for the executor to use the money in the further administration of the estate. They evidently look to an impending, existing debt, requiring further administration to settle it. We might rest this view of the case here, but there is an additional view calculated to remove the doubts that might otherwise hang upon the question: Articles of agreement between the parties were submitted to us, showing conclusively, that all the proceedings in regard to the estate, were to be held subsidiary to a final settlement, and in pursuance of this, the settlement in question was made. Therefore as this settlement was not final, and no evidence of a denial of the trust by James H. Cameron, having been adduced, we are constrained to hold that the trust still continues upon his administrators, and attaches to so much of the estate of Edward Castleberry, as can be found in the possession of his representatives. From this opinion, as regards the statute of limitations, it is due to Mr. Benjamin H. Cameron, to say, he dissents. Our object in this case being to mete out a material and substantial compliance with law and the justice and equity of the case, and the great preliminary question to the investigation being thus settled, we will not embarrass our opinion with views which we consider to be unnecessary. As to the question, whether the necessary and proper parties are before us, we know that in our decree we can so frame the finding as to reach every party beneficially interested and none of the names having been stricken by demurrer, we

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will take care to shape our award so as to reach the justice of the case.

Upon the subject of allowing commissions, we are of the opinion that the estate of James H. Cameron is entitled to them. We concede that he did not make regular returns, and recognize the law in all its severity upon delinquent trustees, but it was the act of the *cestui que trust*, that prevented him from so doing. It was an agreement by adult parties, and substituted for the requirements of law, and the equity; being as large on one side as the other, and the "laborer being worthy of his hire," we award him commissions. These are the legal questions in the case upon which we see fit to submit a written opinion, and we therefore close with the remark, that if there be any point upon which either of the parties desires our opinion reduced to writing, upon giving us ten days notice before the first day of the next Term of Troup Superior Court, we will comply with their request."

It appeared that a copy of the above opinion was served on defendant's counsel, with a copy of the award. It also appears that the agreement referred to in said opinion bore date 6th January, 1841, and was produced, by the direction of the arbitrators, by Benjamin H. Cameron, one of the arbitrators, and was found among the papers belonging to the estate, and that defendants were not present or their attorneys, and knew nothing of this evidence being before the arbitrators, until after the award was made.

The Court refused the motion to set aside the award, but ordered the same to be entered on the minutes, and made the judgment of the Court, and counsel for defendants excepted.

The second case, was a motion made to set aside an award made in an equity cause, pending between John Webb, and others, complainants, and Sena S. Castleberry, executrix of Edward Castleberry, deceased, and Emily S. Cameron and

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Thomas G. Simms, administrators of James H. Cameron, deceased. The award was made by the same arbitrators that made the award in the first case above stated.

The grounds relied on to set aside the award in this case were, that the arbitrators had not decided all the questions submitted to them; that they had not agreed on the same, and that it was contrary to law and the facts of the case.

In this case, the arbitrators say, "our opinion is, that John Webb and Charles Webb, are each entitled to the sum of fifty dollars, as children of Levitha Webb, and that Mary Webb, in the same right, is entitled to forty-three dollars; it appearing that she has heretofore received a credit of seven dollars about 1st April, 1850. Because of superadded words, and the general intent of the will of Edward Castleberry, we conclude, that in the case of these claimants, the testator used the word "heirs of the body," as meaning children. "The executors having had ample time," &c., they allow interest on these legacies.

The Court refused to set aside, but ordered the award to be entered on the minutes and made the judgment of the Court. Whereupon, defendants excepted.

ERSKINE and SIMMS, for plaintiff in error.

HILL and HARRIS, *contra*.

By the Court.—BENNING J. delivering the opinion.

Did the Court err, in overruling the motions to set aside the award in these two cases? We think so.

The motion in the first of these two cases, will be the first considered.

One of the defences in the first case, was, the statute of limitations. If that defence was well founded, it was of course a bar to the whole suit. The question, whether it



was or was not well founded, was therefore, a question which had to be decided, before there could be any legal award.

One of the grounds of the motion, was, that the arbitrators failed to decide this question. Therefore, if that ground was true, the motion ought to have prevailed.

Was that ground true?

The arbitrators, when they served the counsel for the plaintiffs in error, with a copy of the award, also served them, with a copy of another paper. This paper the arbitrators also returned to the Court along with the award. It was signed by all of them. In it the arbitrators use this language; "we are of the opinion, that the statute of limitations, and doctrine of stale demands, does not apply." They then give reasons for this opinion. They, then, say: "From this opinion, as regards the statute of limitations, it is due to Mr. Benjamin H. Cameron, to say, he dissents." Was this paper evidence? for if it was, there was no award on the question of the statute of limitations—the case being one, in which, the concurrence of all three of the arbitrators, was necessary, to an award.

We think, that the paper was evidence. It accompanied the award; it was signed, like the award, by all the arbitrators; it was in award language, as though the arbitrators intended it to be a part of the award; "we are of the opinion, &c.; "from this opinion," &c. "Cameron dissents."

Suppose the case had been before the jury, and the jury had returned into Court, with the two papers, on one of which was written; we find for the plaintiff, (so much;) and, on the other, we cannot agree on the question of the statute of limitations, two-thirds of us, think, that the case is not within that statute, the other third, think that it is within that statute, would not the Court have to recognize both papers, and to treat the latter, equally with the former, as evidence of the action of the jury? Most certainly. Indeed, either party to a case, has the right to poll the jury, and if, on doing so, a single juror answers, that he did not agree to

what was returned, as the verdict, his answer is evidence, and what was received as the verdict is rejected, and the jury sent back to make a verdict.

[1.] We think, then, that the paper was evidence. (See case of the *South Carolina Railroad vs. Moore & Philpot*, decided at Savannah, June Term, 1859.)

[2.] The paper being to be considered, as evidence, it showed, that one of the arbitrators dissented, on the question of the statute of limitations,—a question, the decision of which was necessary, as the defence of the statute of limitations, is one that goes to the whole case. And if on such a question, an arbitrator dissented, the dissent vitiated the whole award; and, therefore, the Court ought to have rejected the award.

Our conclusion, then, is, that this ground of the motion, namely, the ground that the arbitrators had failed to decide the question of the statute of limitations, was a good ground, and, therefore, that the Court erred in overruling the motion.

This would suffice for the case; but, we think it best to express an opinion on another of the grounds—the ground, that the arbitrators had evidence before them, of which the losing side had no notice.

[3.] It appears from this same paper which accompanied the award, that the arbitrators took into consideration, on the question of the statute of limitations, a certain writing, of which, they thus speak, in that paper. "Articles of agreement between the parties were submitted to us, showing conclusively, that all the proceedings in regard to the estate, were to be held subsidiary to a final settlement." This was a writing, then, which, in the estimation of two of the arbitrators, was of so much value, that it was "conclusive" on the question of the statute of limitations. Ought such a writing as that, to have gone before them, without notice to the parties against whom, it was to operate? We think not. And yet, it appears, that it did go before them, that it was placed before them by one of themselves. What

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ought to be the consequence? That the award should be rejected. So we think. Such a matter would be sufficient to require the rejection of a verdict.

It is unnecessary to consider the other grounds of the motion.

So much for the motion in the first of the two cases.

I proceed to the motion in the second of the two cases.

Did the Court err, in overruling the motion to set aside the award in that case. We think so.

The award in that case, had to fall with the fall of the award in the other.

It appears, that the two cases were submitted to the same arbitrators, at the same time, under the same order of Court; and, that the two were considered together, by the arbitrators, and decided by them at the same time, the 19th of October, 1859. It appears, that, in the second case, they awarded, that the plaintiffs in error should pay the defendants in error, certain sums of money, and that these sums were to be paid out of a sum of \$3,773 16 cents, which, by the award in the other case, the arbitrators said, they found and awarded, to be in the hands of the plaintiff in error, "belonging to the estate of Edward Castleberry, deceased, and subject to be disposed of according to the will of said deceased." The award in that other case, having been set aside by us, there is nothing to show, that the plaintiffs in error have in hand anything out of which to pay the sums awarded in this case.

In short, there is nothing to show, that the award in the last case, would have been what it was, if the award in the first, had not been what it was. The award in the first falling, the award in the second, ought, therefore, to fall with it.

[4.] We think then, that the award in this second case also, ought to be rejected.

Judgment reversed in both cases.

JOHN B. WILLIAMS et al, plaintiffs in error, vs. LOVICK P. GARRISON, defendant in error.

[1.] When the allegations are stated feebly in the bill, and denied strongly in the answer, the injunction ought, in general, to be dissolved.

[2.] Although the relation of landlord and tenant prevents the tenant from disputing the landlord's title, yet it does not prevent him from buying up a title, to be asserted after the termination of the tenancy and the redelivery of the land.

In Equity, in Polk Superior Court. Decision by Judge HAMMOND, April, 1859.

This was a bill filed by Lovick P. Garrison, against John B. Williams, Henry M. Williams, and Edward D. Chisholm, and alleges in substance, as follows :

That in the year 1852, George M. Garrison, the brother of complainant, being largely indebted, probably insolvent, and being desirous of selling the tract of land owned by him, and upon which he resided, to raise money to pay his debts, sold the same to one Joseph Taylor, one of his creditors, and also representing other creditors, in payment and satisfaction of said debt. That complainant, with a view of assisting his brother in making this arrangement, and to induce Taylor to take the land, agreed to take the land from him, Taylor, at the same price that he was to have it at; the price being \$1,201 75, with the verbal understanding, that complainant would not be called on or required to pay the purchase money until he could sell the place. Under this arrangement, Taylor purchased said land and took a deed therefor from George M. Garrison, and executed to complainant his bond for titles, and took complainant's notes for the purchase money. That complainant afterwards purchased another lot of land adjoining the settlement. Afterwards, in December, 1853, complainant sold the land to John

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B. Williams for \$1,500, \$750 to be paid 25th December, 1853, and \$750, to be paid 25th December, 1854, and took complainant's bond for titles, and entered into possession of the premises, and paid the first note at its maturity. That afterwards, ascertaining that there was a defect in the title to one of the lots, number twenty, said Williams filed his bill in equity, to restrain complainant from trading the note which remained unpaid; and complainant afterwards, having sued Williams on said note, he amended his bill to enjoin said action. Pending this controversy, and in settlement of the same, complainant and said Williams rescinded said trade; complainant delivering up the unpaid note and refunding that part of the purchase money which he had received, and Williams delivering up the bond for titles executed to him by complainant; but agreeing to remain on the premises as the tenant of complainant.

That at the time said settlement was thus made between complainant and said Williams, he had ascertained the person who had the title to said lot, number twenty, to wit, one Flournoy, and that said John B. Williams, confederating with his son, Henry Williams, and Edward D. Chisholm, purchased said lot from Flournoy, for a very small amount, and had the titles executed to said Henry Williams. And that in furtherance and consummation of this arrangement to defraud complainant, an action of ejectment was instituted by said Henry, against said John B. Williams, for the recovery of said lot, and that complainant came in and was made a party defendant. The bill prays that said action of ejectment be enjoined, and that upon the payment by complainant to said John B. Williams of the amount he paid Flournoy for said lot, that he be ordered and decreed to convey the same to complainant.

The defendants answered the bill, and moved to dissolve the injunction, upon the ground that all the equity had been fully denied and sworn off.

The Court overruled the motion and retained the injunction, and counsel for defendants excepted.

CHISHOLM & WADDELL, for plaintiffs in error.

FIELDER & BROYLES, *contra*.

By the Court.—BENNING J. delivering the opinion.

Did the Court err in overruling the motion to dissolve the injunction? We think so.

We think that if there was any equity in the bill, it was very fully sworn off, by the answer.

The bill contains this statement; "Your orator does not know of his own knowledge, whether the knowledge of the ownership of said Flournoy, came to said Williams, before, or after, said compromise, but believes and charges, that it was before." This is an allegation essential to the equity of the bill; and it is in a very weak form. It is put on mere belief, and no reason is assigned for the belief.

It is most positively denied by the answer. The answer says, that "he," (John B. Williams,) never did ascertain the true owner thereof, until after the said settlement of said suit between complainant and said John B., and, that at the time said settlement and compromise was so made, the said John B. was ignorant of the ownership of said lot." In another place, the answer says: "These defendants most expressly, and positively and emphatically deny, that they, or either of them knew anything whatever of the ownership of said lot, number twenty, before, or at the time of the settlement and compromise aforesaid, and that it could be bought for \$75, or any other sum, large or small. Nor did they, or either of them, know of the existence of any such

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man in the world, as John Flournoy, at the time, or before, the said compromise was entered into."

The answer goes on to say, in still another place; "that, after said compromise, the said John B. ascertained from a man by the name of Maund, that he, Maund, knew the owner of said lot of land, and that said lot could be had."

[1.] In these parts of the answer, there is a full, particular, and positive, denial of the allegation of the bill, and that allegation itself, was, as we have seen, but weak. And we think, that as a general rule, when the equity-giving allegations of a bill, are stated weakly, and denied strongly, the injunction granted on those allegations, ought to be dissolved. In such a case, there is no probability, that there exists evidence, to overcome the answer. Why then should the injunction be retained?

It was argued for the defendant in error, that at the time of the purchase of the lot by Williams from Flournoy, Williams was holding the land, as the complainant's tenant; and, that the relation of landlord and tenant is such, that Williams was not at liberty to purchase the land except for his landlord.

[2.] The relation of landlord and tenant is such, that it, in most cases, deprives the tenant of the right to dispute his landlord's title. Therefore, in most cases, the tenant is not at liberty, to refuse to redeliver the land to the landlord, at the end of the term. But we do not know of any principle which prevents the tenant from buying up a title to the land; true, there may be a principle that forbids him to assert that title, during the term, and that commands him to deliver up the land to his landlord at the end of the term; but we are not prepared to say that there is any principle goes further than this.

Even, however, if the counsel for the defendant are right, the answer denies the ground on which they go. The answer says, that the land was not bought by the tenant, John

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R. Williams, but by his son, Henry ; and the answer is just as full and positive, in this respect, as it was in the other.

In any view of the case, then, we think, that the Court erred in not dissolving the injunction.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MILLEDGEVILLE,
NOVEMBER TERM, 1859.

Present—JOSEPH H. LUMPKIN.
HENRY L. BENNING,
LINTON STEPHENS, } Judges.

SUSAN W. LIVELY and HUSBAND, plaintiffs in error, vs. THOMAS B. HARWELL, executor, defendant in error.

- [1.] The probate of a will made upon only five days notice to the widow of the testator, at a time when she is in a novel and distressed condition, is not probate in solemn form as to her.
- [2.] A will being revoked by the subsequent execution of an inconsistent one, is it revived by the single fact that the subsequent will is itself afterwards revoked?
- [3.] A will having been last known in the custody of the testator, and not found after his death, is presumed to have been destroyed by him.

Petition to revoke probate of will and letters testamentary, in Putnam Superior Court. Tried before Judge HARDEMAN, at September Term, 1859.

This was a proceeding before the Court of Ordinary, on the part of Susan W. Lively, the widow of Lewis P. Harwell, deceased, but who, since his death, has intermarried with George W. Lively, and the said George W., to annul

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and revoke the probate of a paper pronounced and recorded as the last will and testament of said deceased by said Court of Ordinary, upon the grounds:

1st. Because said paper writing, dated 15th February, 1858, after the making thereof, was in the lifetime of deceased revoked by him, by the execution and publication of a will of a later date, to-wit: about 1st July, 1858.

2d. Because, after the revocation of the will of 15th February, 1858, the same was never republished or revived by deceased.

3d. Because the paper dated 15th February, 1858, is not the last will and testament of deceased, but the paper of 1st July, 1858, and that the former was improperly admitted to record and probate.

4th. Because the will or paper of July, 1858, has never been produced for probate, or in any matter put in issue.

Thomas B. Harwell, the executor of the will of February, 1858, and to whom letters testamentary thereon had been granted, on being served with a copy of the petition, and an order or rule to show cause why said probate and letters should not be revoked, appeared, and for cause why, &c., showed:

1st. That said Susan W., the widow and heir at law of deceased, was duly cited to be and appear at the Court of Ordinary, where and when said probate was granted. That she failed to appear, but permitted said will to be admitted to record, expressing herself satisfied that the same should be probated. And having been thus made a party to said proceeding, she is now concluded by the action and judgment of said Court.

2d. That since said probate and the granting of letters testamentary to respondent, the said Susan W. has had in possession and under her control, the house and lot and furniture devised and bequeathed to her for life, in and by said

will, and that she has not returned or made an offer to return the same to respondent.

3d. That said Susan W. has recognized respondent as the executor of said will; acquiesced in his qualification, and purchased property at the sale made by him as executor, and received from him the twelve months' support allowed to her by law.

For the foregoing reasons, respondent submitted that said Susan W. was estopped from contesting said probate and letters, and from moving to annul and revoke the same.

Respondent further answered, that said probate should not be revoked, because said will was not revoked by Lewis P. Harwell in his lifetime; and even if there was a later will, as alleged, the same had no revoking clause—was not materially different in its provisions from the one probated—and such later will being in the possession of deceased, and not found since his death, the presumption is that he destroyed it, and thereby revived and set up the will probated.

After argument, the Ordinary dismissed the rule, holding that movants were estopped by the proceedings had upon the probate; and holding further, that said probate was in solemn form. From this decision movants appealed, and the cause being transferred to the Superior Court, came on for trial at September Term, 1859. At the conclusion of the testimony, and after argument, the Court, at the request of counsel for respondent, charged as follows:

1st. That when citation is duly issued to the heir at law, and served, to appear and witness the probate of a will, and the will is proven by a public examination of the witnesses in Court, the probate is in solemn form as to said heir at law.

2d. That the proof of the execution of a later will and of its contents, does not revoke the probate of a prior will, made in solemn form, unless the original is proved to have been lost or destroyed, or fraudulently suppressed.

3d. That the probate of a prior will is not revoked by a later will, unless the original or a copy of the same is sought

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to be set up by some one having an interest under it, and is propounded for probate in lieu of the prior will.

4th. That when a will is proven to have been delivered to the testator immediately after its execution, and deposited by him among his valuable papers, and after his death diligent search is made for it and it cannot be found, the presumption of law is, that the testator himself destroyed, and thereby revoked it, and the *onus* is cast upon the party seeking to set it up, to show that it was destroyed, or fraudulently suppressed or lost.

5th. That by the Ecclesiastical Law, a later will does not revoke a prior will, unless there is an express revocatory clause, or a conflict in the two provisions of the two wills; and in that event, whether the revocation of the last will sets up or revokes the prior will, is a question of intention to be left to the jury.

To the first four foregoing charges given, as requested, counsel for movants excepted.

The jury found for the respondent; whereupon, counsel for movants moved for a new trial upon the following grounds:

1st. Because the verdict was contrary to law and the evidence.

2d. Because the first request, as given in charge, although correct as a general legal proposition, yet, under the facts of the case, being a proceeding not for a second probate, but to revoke one already granted, tended to mislead the jury, and to induce them to believe that the presiding Judge held, that the probate was not only in solemn form, but that it estopped plaintiffs from moving to revoke it, even after the proof of a later will revoking the one admitted to probate.

3d. Because the charge of the Court, in the language of the second, third and fourth requests, was erroneous.

The Court overruled the motion, and refused a new trial; to which decision counsel for movants excepted, and assigned the same as error.

W. McKINLY; and J. W. HUDSON, for plaintiffs in error.

E. A. & J. A. NISBET, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

Error is assigned in this case on the first four charges given by the Judge.

[1.] The first charge gives correctly the abstract law as to what constitutes probate in solemn form, but we think it was error to give that charge in this case, because there were not facts which could, as we think, have authorized the jury to conclude that the probate which was attacked, had been made in solemn form. The widow, in this case, had but five days notice of the time when the will would be propounded, and we do not think that was sufficient notice, under the circumstances. True, there is no time prescribed, so far as we are informed, but a *reasonable* time has always been required by the Courts. We do not think that five days was a reasonable notice to a woman who had been very recently thrown, perhaps for the first time in her life, upon her own business talents, under circumstances of such affliction as would naturally draw her thoughts away from subjects of business. This was a very important matter to her, and five days was too short a period for one in her novel and distressed condition to make the necessary preparation of procuring skillful counsel, and looking up evidence. This view is greatly strengthened by analogy. In the Superior and Inferior Courts of this State, the party defendant is allowed twenty days within which to make up his pleadings, and then six months afterwards to prepare his evidence. Even in Justices' Courts, whose jurisdiction is limited to very small and comparatively unimportant amounts, the defendant has ten days for the preparation of his pleadings, and a month afterwards to prepare his evidence. Here, a matter of great

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consequence was in issue, and Mrs. Harwell was required to procure counsel, make up her pleadings, and hunt up and produce her evidence, all within the short space of five days. There is obviously *some* limit to the shortness of a valid notice—nobody will say a minute or an hour will do—and we are constrained to think that the time allowed in this case was unreasonably short. There was, therefore, no evidence to authorize the jury to consider that there had been a probate in solemn form, and that issue ought not to have been submitted to them.

The second charge was founded on the first, and of course falls with it. There had been no probate in solemn form, and it was error to base a charge on the theory of such a probate.

[2.] The third charge is manifestly inconsistent with the fifth, which certainly presents the law for the executor as favorably as it exists. This third charge relates to the revocation of probate generally, probate in common form as well as probate in solemn form. Bearing this in mind, its inconsistency with the fifth charge is easily shown. Now, probate in common form does not bind the heir, nor does even probate in solemn form bind her, when the revocation is sought on the discovery of a later will which was not known at the time of the probate. And when she is *not bound* by the probate, she may have it revoked for any cause which would have defeated it at first. This charge then is equivalent to an assertion that the probate of a will can not be defeated by showing that a later inconsistent will was executed, unless that later will be propounded for probate. Now, suppose the later will to have been *revoked*—if so, it cannot be propounded for probate, and yet, according to the proposition contained in the fifth charge, it may defeat the probate of the older will, according as the last was revoked with an intention to revive the first or not. That is to say, the third charge asserts that a later will can not defeat the probate of a prior one, unless the later is itself carried to probate; while

the fifth charge asserts that the later will, *without* being offered for probate, may or may not defeat the prior one. This third charge then is inconsistent with the fifth. But the material inquiry is, whether it is inconsistent with the *law*? We think it is; for we think the fifth charge gives the law quite as favorably to the executor as he was entitled to have it. There was no error assigned upon the fifth charge, and we shall not deliver any judgment on it; but as the question involved in it was thoroughly argued by both sides, I will state, for a future guide in discussing the point, what was the inclination of Judge BENNING and myself (Judge LUMPKIN being absent), and I will add that subsequent reflection and examination of authorities have strengthened my own impression. It has been a long mooted question whether the single fact of the revocation of a subsequent will, revives a prior revoked one. The argument in favor of the revival is this: The first will would be good but for the last which revokes it, and this last being itself afterwards revoked, becomes a *nullity*—has no effect whatever, and of course leaves the prior will unaffected. And it is analogized to the case of a statute revived by the repeal of another which had repealed the first. Such is the rule of the common law in the case of *statutes*, but the civil law is different, and so is the good reason of the thing different. Where a principle is *sound*, it ought to be carried to all strictly analogous cases, unless stringent authority forbids; but if the principle be *unsound*, analogy ought not to be allowed to carry it to a single case beyond the imperative demands of authority—the cases in which it has been already planted by decisions. Then is it a sound *logical* principle that a statute is revived by killing the statute which had previously killed the first? Is a dead man revived by killing his slayer? Is not the result rather this: whereas you had at first one dead man, now you have two? But this is itself but an analogy, and analogies are often fallacious from want of exact parallelism in the two cases. Take, therefore, the case before us. Here are two

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wills of different dates and inconsistent provisions, and the last one, in point of date, is confessedly revoked. Which of these papers, or does either show the final testamentary mind of the testator? I say neither does. The last one does not, as is admitted by everybody, for it is expressly revoked. How is it with the first? That contains what was *once* his mind, but we know that he changed that mind when he *made the last one*. How do we know that he ever reverted to it? It is said that he changed again when he revoked the last. This is true, but *to what* did he change? The case is this: he had a scheme and abandoned it for another, and then abandoned the second. All so far is clear and satisfactory, but can you go further and say that, when he abandoned the last, he returned to the first? If these two schemes comprehended *ALL the possible dispositions* of his property, then the conclusion would be a logical one, that when he abandoned the one he returned to the other. But when the number of possible schemes in every case is legion, you can not say that because he has departed from any one, you know his mind has settled upon any other particular one out of that infinite number. The whole fallacy lies in assuming that the two papers *exhaust* the subject. It seems to me that the abandonment of any one scheme does not of itself afford the least *indication* in favor of any other particular one out of an infinite number. Then it can not be said, as the third charge declares, that the probate of a will can not be defeated or revoked by proof of a later inconsistent will, unless the last one itself goes to probate. The question on the probate of a will is, whether the paper propounded contains the final testamentary scheme of the testator? If it dont, it is not his will, and any paper which shows that though the paper propounded was once his will, it had *ceased* to be so, would defeat the proposed probate, (without rebutting proof) whether such later paper were itself offered for probate or not.

[3.] The fourth charge is good, so far as it relates to the presumption of the destruction of a will by the testator him-

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self, arising from the fact that it was last known in his custody and can not now be found; but so far as it relates to the burden being cast on the person seeking to *set up* the missing will, we think it is erroneous for two reasons. It assumes that the caveatrix was attempting to set up the missing will, when she was in fact claiming an intestacy. It was therefore inapplicable to the case. It was wrong, also, because it rests upon the third as its basis, and of course falls with it.

Judgment reversed.

WRIGHT COLLINS, plaintiff in error, vs. JANE P. COLLINS, defendant in error.

Where the husband has a clear estate of twelve thousand dollars, twenty-five dollars per month is not excessive temporary alimony for the wife, nor is five hundred dollars excessive counsel fees for her, she having been of high character previously, and her character for chastity being attacked by the defence.

Divorce and alimony, in Telfair Superior Court. Decision by Judge Love, October, 1859.

This was a libel for divorce, *a vinculo matrimonii*, by Jane P. Collins against Wright Collins, her husband. The grounds of divorce, as set forth in the libel, were cruel treatment, and a false charge of infidelity and want of chastity, made against her by her husband, and driving her with her youngest child from his house, leaving them without means of support.

Attached to the libel was a schedule of defendant's property, amounting to \$17,355.

The defendant answered, admitting the marriage and birth

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and ages of the children, as alleged in the libel, but denied that the youngest child was his, but averring that it was some other man's. Admitted the correctness of the schedule of his estate, filed with the libel, but alleged that a part thereof was unpaid for, and that his notes were outstanding for the same, and that he was indebted about five thousand dollars.

Upon hearing the libel and answer, and proof on the part of plaintiff, that defendant was worth the amount contained in the schedule, that he made good crops, and that plaintiff had no separate estate, the presiding Judge granted the following order, viz:

"It is ordered, that the said Wright Collins pay over the sum of five hundred dollars for counsel fees in prosecuting the said divorce case; and that he pay to Jane P. Collins the sum of twenty-five dollars per month, as temporary alimony, to commence from the first day of September last, and to continue until the termination of the said divorce cause."

To which order defendant excepted, on the ground that the amounts ordered to be paid for counsel fees and alimony, were unreasonable and excessive.

C. B. COLE; and J. R. COCHRAN, for plaintiff in error.

I. L. HARRIS, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

The question is, whether the Judge's award to the wife, of twenty-five dollars per month as temporary alimony, and five hundred dollars as counsel fees, was so excessive as to be set aside for that reason. We do not think there was such excess in either item, as requires us to set the award aside. With a clear estate of twelve thousand dollars in the husband, we do not regard twenty-five dollars as an excessive monthly allowance for the wife. A lady in her condi-

tion in life, might very reasonably expect to be indulged with a servant, and her own board with servant hire and servant's board, would in any part of this State, leave, out of twenty-five dollars per month, but little for clothing—an item which is not to be entirely overlooked.

In support of the large counsel fees allowed in this case, it must be borne in mind, that this was a lady who had previously sustained a high character, and that that character was directly put in issue by the husband's line of defence. As nothing can be dearer to a lady than her character for chastity, so nothing could justify greater expense in its defence.

Judgment affirmed.

WILLIAM L. MOODY, caveator, plaintiff in error, vs. THOMAS H. MOODY, applicant, defendant in error.

- [1.] An appeal from the Court of Ordinary, like an appeal in other cases, carries up the whole case for a new hearing on all the legal evidence that can be produced, whether such evidence has been produced on the first trial or is first offered at the appeal trial.
- [2.] In passing upon rival applications for letters of administration, by two persons standing equal in blood to the intestate, the facts that one of the applicants has been advanced to the extent of his full share in the estate, and is setting up an adverse claim to property which was in possession of the intestate at the time of his death, are facts which ought to be admitted in evidence and considered.

Caveat to granting administration, in Morgan Superior Court. Tried before Judge HARDEMAN, at September Term, 1859.

Moody vs. Moody.

This was an application to the Court of Ordinary of Morgan county, by Thomas H. Moody, for letters of administration on the estate of John L. Moody, deceased, the father of applicant. William L. Moody, another and only other surviving son of intestate, filed a caveat to the granting said administration on the grounds, that the applicant claimed a large part of the estate of which deceased died possessed, and which claim was in conflict with his duties as administrator of said estate, and further, because said Thomas H. Moody had been advanced by intestate in his lifetime, more than his share of said estate, and had no interest in the same.

The Court of Ordinary pronounced in favor of the applicant, Thomas H. Moody, and awarded the administration to him, from which judgment caveator appealed.

At the trial in the Superior Court, caveator proposed to prove, that the intestate, John L. Moody, died possessed of a plantation and negroes, stock and other personal estate, worth about seventeen thousand dollars, and over which up to the time of his death, he exercised sole control and dominion as his own property. That of the whole of this estate said Thomas L. Moody claims to have been the owner before and at the death of the said John L. Moody, with the exception of a small portion, amounting to about twelve hundred dollars. He further proposed to prove that the said Thomas H. had received advancements from deceased in his lifetime, more than one-third the value of said estate, including all advancements made by deceased to his children. [It appeared that the heirs at law were Thomas H., the applicant, William L., the caveator, and the children of a deceased son of intestate.] All of which the Court rejected, and refused to allow the same to be introduced and submitted to the jury, upon the grounds, the same was irrelevant and insufficient, if true, to disturb the decision made by the Ordinary To which ruling counsel for caveator excepted.

The jury rendered the following verdict: "We the jury

find in favor of the applicant, Thomas H. Moody, and affirm the judgment of the Court of Ordinary in granting to him letters of administration on the estate of John L. Moody."

Whereupon, counsel for caveator tendered their bill of exceptions assigning as error the decision aforesaid.

JOSHUA HILL, for plaintiff in error.

AUGUSTUS REESE, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

This is a contest between two brothers for administration on the estate of their father. William Moody, on the appeal trial, offered to show two facts, which he contended, disqualified, or tended to disqualify his brother Thomas—one was, that Thomas had already received his full share of the estate by way of advancement, and the other was, that Thomas was setting up an adverse claim to the larger part of the property of which the father died possessed. The Judge, excluded the evidence, but we think it ought to have been admitted. It was contended in argument that in deciding between rival applicants standing in the same degree, the Ordinary is clothed with a *discretion*, which will not be controlled, except for the violation of some rule of law. We do not think this is a correct view of the subject. If only errors of law in the Ordinary were to be corrected, the remedy would be *certiorari*, and not an appeal. But the remedy is appeal, and by our Act of 1821, (see *Cobb's Digest*, 497,) appeals from the Court of Ordinary are to be tried by a special jury "in the same way, and under the same regulations as other appeals." This takes up the whole case *de novo*, and submits it to the jury upon all the legal evidence which is produced *then*, without regard to what evidence may have been before the Ordinary, on the first trial. Whatever discretion is vested in

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the Ordinary is passed to the jury by the appeal, and they ought to have submitted to them all evidence which tends to illustrate the personal fitness of rival applicants, no less than evidence, showing a legal disqualification of one of them. There is strong reason for saying that one of the facts offered to be proven in this case, that is, the fact that Thomas was not entitled to any part of the estate remaining to be administered, amounts to a legal disqualification of him in a contest with his brother, who has no such want of interest; for letters of administration, are by express statute to be granted according to the same rules which govern in the distribution of estates. Now, if he, who has been advanced his full share can have no further part of the estate, can he be entitled to administration against one, who has an interest in the estate? We decline to say that the fact in question amounts to a legal exclusion, but we do say, that it ought to have been submitted to the jury as bearing at least upon the personal fitness of Thomas. And so of the other fact, that he was claiming for himself a large part of the estate left by his father. If this were true, his interest was hostile to the interest of the estate, and estates like everything else in life, are generally better off in the hands of their friends than in the hands of their enemies.

Judgment reversed.

JAMES M. REINHART, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

[1.] A motion in arrest of judgment can be sustained only upon such cause as is apparent upon the face of the record.

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[2.] Where a copy presentment appears from the minutes of Court to have been established in lieu of a lost original, and the defendant is tried on a paper which purports to be the original,

Held, That it does not appear from the whole record, that the paper was not the original, for the paper itself which is a part of the record, purports to be that original which once was lost, its presence purporting that it has been found.

[3.] A general order from the owner, overseer or employer of a slave to a vendor of spirits, requesting him to let the slave have spirits in reasonable quantity whenever he wants it, is no justification for furnishing any quantity, however small.

Indictment for furnishing a slave with spirituous liquors, and motion in arrest of judgment, and for new trial. In Laurens Superior Court, before Judge HANSELL, at October Term, 1859.

At the October Term, 1857, of Laurens Superior Court, four presentments were made by the grand jury, against James M. Reinhart, the plaintiff in error, all for furnishing spirituous liquors to a slave. At the April adjourned Term, 1859, the defendant was put upon trial on one of said presentments; he waived formal arraignment, and plead not guilty. Before going into trial, his counsel inquired of the Solicitor General, Edward T. Sheftall, Esq., whether he was proceeding on the original presentment, or an established copy, to which the Solicitor General replied, that he was proceeding on the original, which had been mislaid, but which he had found. It appeared that all the presentments had been lost or destroyed, and copies established at April Term, 1858, upon the motion of the Solicitor General, and that defendant had been tried at said Term, upon one of said cases, and acquitted. It further appeared that said presentments had not been spread out in full on the minutes of the Court, but entries thereon of each, made as follows:

"The State,	}	Furnishing a slave with spirituous liquors.
vs. James M. Reinhart.		

Special presentment of the grand jury.

DANIEL H. COOMBS, Foreman."

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The trial proceeded, and defendant was found guilty. Whereupon, his counsel moved in arrest of judgment, upon the ground, that he had not been tried and convicted upon an indictment found by the grand jury, nor upon a legally established copy of such indictment.

At the same time counsel for defendant moved for a new trial upon the ground that the verdict was contrary to law and the evidence.

Upon the argument of these motions, it was admitted by the Solicitor General, that the indictment was only a copy, established by order of Court, and not the original presentment, as he had supposed, and by mistake, had stated when going into the trial.

The Court after argument, refused both motions, and defendant by his counsel excepted and assigned said refusal as error.

DANIEL & ANDERSON, for plaintiff in error.

SOL. GENERAL, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1. & 2.] The motion in arrest of judgment in this case, is founded on the allegation, that the defendant was not tried upon an original indictment found by the grand jury, nor upon a legally established copy. The record discloses that the indictment was expressly waived by the defendant, and the presentment put in its stead. The allegation then is answered by this waiver, unless it be understood as an allegation that the paper on which he was tried, was not an original *presentment* nor a legally established copy. Construing the allegation in this sense, it is unnecessary to consider whether it is true or not, for it is sufficient that it is not shown to be true on the *face of the record*. It is a well settled principle, that a motion in arrest of judgment can be

sustained only upon such cause as is apparent upon the face of the record. The effort in this case to show the fact by affidavits, is a confession, (if any evidence were needed,) that it did not appear upon the face of the record. The paper on which the trial was had, *purported* to be the original presentment, and there is nothing on the record showing that it was not what it purported to be. It was said in the argument, that the record showed the original had been destroyed or lost. True, but it did not show that being lost, it had never been found. If found, it was the proper paper on which to have the trial, notwithstanding a copy had been established in its place. The paper itself is a part of that record into which the Court had to look, in considering the motion in arrest of judgment; and the paper purported to be the original, that is to say, it purported that it had been *found*. There is nothing else in the record inconsistent with this, and there is nothing there, therefore, to support this motion. Had a motion for a new trial been made on the ground, that the paper, though purporting to be the original, was not such, nor a *true* copy, and that the defendant had been misled by the statement of the Solicitor General, into such a mistake as could have *hurt* him, the case would be a very different one. But the motion for a new trial is not founded at all upon this matter, but only on the ground, that

[3.] The verdict was unsupported by the evidence. There was an abundance of evidence showing, that the defendant had repeatedly sold liquor to the negro in question for his own use, and that the negro had drunk the liquor in his presence. But it was attempted to justify this selling under a general verbal order from the employer of the negro to the defendant, to let the negro have spirits in "reasonable quantity," whenever he wanted it. It may be remarked that this very defence shows that the spirit was for the negro's own use, but it utterly fails to show legal authority for the sale. The law does allow the owner, overseer or employer of the slave, to furnish him such quantity as the *owner, overseer* or

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employer may deem beneficial to the slave's health, but the law has not done so foolish a thing as to put this same discretion in him who sells the spirits, nor can it be put there by delegation from him who has it. If it were placed there, the quantity supplied would generally depend much less upon its "reasonableness" or healthfulness, than upon the amount of money the slave might happen to have. How many vendors would consider that a purchaser was transcending the limits of reason or health, so long as he was paying for all he got?

Judgment affirmed.

GILLA SANDERS, plaintiff in error, vs. F. S. JOHNSON, defendant in error.

- [1.] A note though given on Sunday, and given in a work not of "necessity or charity," is yet, not within the Act of 1762, for keeping holy the Lord's day, and other purposes, if it be made otherwise than in the exercise of the "ordinary callings" of the parties to the note.
- [2.] On the party pleading the said Act of 1762, is the onus of showing, that the contract resisted, was made by the parties to it, in the exercise of "worldly labor, business, or work, of their ordinary callings."

Attachment and assumpsit, in Jones Superior Court. Tried before Judge HARDEMAN, at October Term, 1859.

This was an attachment by F. S. Johnson, plaintiff below, against Gilla Sanders, defendant below, on the following promissory note, to-wit:

§150. JONES COUNTY, GEORGIA, Nov. 4th, 1854.

On or before the first day of January, 1856, we, or either of us, promise to pay F. S. Johnson, or bearer, one hundred and fifty dollars, value received.

(Signed,)

his
WILSON X SANDERS,
mark.

her
GILLA X SANDERS,
mark.

Witness.

his
BERRY X SANDERS,
mark.

It appeared by agreement of counsel, that the note sued on was made and signed on Sunday, 5th November, 1854. That the consideration thereof was goods sold and delivered to Wilson Sanders, by plaintiff; that said goods were sold anterior to the making the note, and on business days, or days other than Sundays, and that defendant signed said note as security.

Upon this testimony, defendant requested the Court to charge the jury, "that if the note was made and executed on the Sabbath or Lord's day, they should find for the defendant, as notes made and executed on that day, are void, unless the same be for works of necessity or charity;" which charge the Court refused to give, but on the contrary, charged the jury, "that the defendant by signing the note, admits its consideration to be good, and that the note before them is legal and collectable."

To which charge and refusal to charge, counsel for defendant excepted.

The jury found for the plaintiff the full amount of the note, and counsel for defendant tendered their bill of exceptions, assigning as error the charge, and refusal to charge as aforesaid.

Sanders vs. Johnson.

ISAAC HARDEMAN, for plaintiff in error.

R. W. BONNER, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in refusing to charge as requested? We think so.

[1.] If the note was given otherwise than in the exercise of "any worldly labor, business, or work of the ordinary" "callings" of the parties to it, the note, though made on Sunday, was not within the Act of 1762, (*Cobb* 853,) and, therefore, was not rendered void by that Act. The request takes no notice of this hypothesis, but assumes, that *all* notes made on Sunday, are void, except those made in "works of necessity or charity." The request was, therefore, we think, erroneous. *Drury vs. Defontaine*, 1 *Taunt.* 131; *Blozsome vs. Williams*, 3 *B. and C.*, 233, 234; *Sandiman vs. Beach*, 7 *B. and C.*, 96; *Rex vs. Inhabitants of Whittrash*, 7 *B. and C.*, 596; *Chitty on Con.* 423.

Was the charge right? We see no error in it.

[2.] It does not appear from the evidence, that the note was made by the parties to it, in the exercise of "worldly labor, business, or work, of their ordinary callings;" and the onus was upon the defendant, (the plaintiff in error,) to show, that it was. It is to be presumed, that all persons are innocent until it is shown, that they are guilty. It is to be presumed, therefore, that the making of the note was *not* in the exercise of the ordinary callings of the parties to the note, until the contrary is shown. The evidence does not tell us, what was the ordinary calling of any of those parties—the payee—the principal—the surety. The onus then, standing as it did, and the evidence being as it was, we think, with the Court below, that the note was to be regarded as "collectable."

Thus far, the aim has been, to show, that the case is not

within the Act of 1762. But even if it were within that Act, two serious questions would remain—one, whether the note would be *void*. In *Comyn vs. Boyer*, (*Cro. Eliz.*, 485,) the King's bench held, that a contract within a similar statute, was not void. That Court's view, probably, was, that the penalty was to be inflicted, but that the contract was to be held good. And it is difficult to suppose, that any Legislature could intend to aid dishonesty, by allowing parties to repudiate their obligations, merely because incurred on Sunday. Encouraging crime is a poor way to punish crime.

The other question is, whether the Act of 1762, was not repealed by the 10th section of the 4th article of the Constitution of Georgia. Does not that Act give to those "religious societies," which believe, that the "Lord's day" is the first day of the week, a "preference" over those which believe, that the "Lord's day" is the seventh day of the week? If it does, it is in conflict with that section.

These questions we do not determine, that not being necessary in the view we take of the case.

Judgment affirmed.

THOMAS B. RAINES and WIFE, et al., plaintiffs in error, vs.
ELISHA PERRYMAN, defendant in error.

[1.] In trover, a deed to the plaintiff, from one who has no title, can give the plaintiff no right to recover.

[, 3, 4.] When the existence of superior evidence is shown, inferior evidence is not admissible, until it is also shown, that the superior is not attainable.

Raines et ux. et al. vs. Perryman.

Trover for negroes, in Putnam Superior Court. Tried before Judge HARDEMAN, at September Term, 1859.

This was an action of trover brought by plaintiffs in error, against the defendant in error, for a negro woman named Malinda and her increase.

The defendant pleaded the general issue and the statute of limitations.

Upon the trial plaintiffs proved that the negroes in controversy were in the possession of defendant, and held and used by him as his own property. He further proved the value of said negroes and their hire. That defendant got Malinda from David Perryman, and that they were claimed by Nancy Perryman or her children, the present plaintiffs. That Nancy Perryman died in 1850. That plaintiffs are the children of David and Nancy Perryman. That they had no children in 1828; plaintiffs were born after that year.

Plaintiffs then offered in evidence the following deed, viz :

“ GEORGIA, GREEN COUNTY. .

Know all men by these presents, that I, James Fretwell, of the county and State aforesaid, for and in consideration of the sum of five dollars to me in hand paid, as well as for the good will and affection which I have and bear to Nancy Perryman, have given, granted, bargained and conveyed, and hereby give, grant, bargain and convey, and deliver to Cullen Fretwell, his heirs, executors and administrators, in trust for the sole and separate use of the said Nancy Perryman, during her natural life, a certain negro girl named Malinda about 15 or 16 years of age, to have and to hold said negro girl Malinda and her increase, unto him the said Cullen A. Fretwell, his heirs, executors and administrators, for the sole use and benefit of the said Nancy Perryman, during her natural life, and at her death the right and title of said negro girl Malinda and her increase, to go to and be vested in such children as the said Nancy Perryman may have living at her death.

In testimony whereof I have hereunto set my hand and seal. This 5th January, 1829.

(Signed) JAMES FRETWELL. [SEAL.]

In presence of

JNO. S. CAREY,

JAMES S. PARK, *J. I. C. G. C.*"

Defendant objected to the introduction in evidence of this deed, unless its execution was first proved, it not having been recorded agreeably to law, and therefore not admissible in evidence without proof of execution. The Court sustained the objection; whereupon, plaintiffs proved the execution of said deed by the subscribing witnesses thereto, as well as by James Fretwell, the donor, and closed.

Defendant's counsel moved for a nonsuit, upon the ground that plaintiffs had shown no title to the negroes sued for, the deed from Fretwell not being evidence in itself of title in him, when it appeared from his depositions that he never had the possession of said negro Malinda, and there being no evidence of title in Fretwell.

The Court stated that it would sustain the motion for a nonsuit upon the case, as then made by plaintiffs, but permitted them to adduce further proof, and to proceed with their case. To which ruling plaintiffs excepted.

It was admitted by defendant's counsel that Martha Henderson, daughter of John Henderson, was the wife of James Fretwell.

Plaintiffs further proved by the depositions of Cullen A. Fretwell and Elizabeth Fretwell that, in the year 1824, John Henderson, the father of Mrs. Fretwell, loaned said negro Malinda to Nancy Perryman. He said to deponents, "that he was taking the said negro girl Malinda to loan to Nancy Perryman, as she was a negro he had given to his daughter Martha," and they saw him taking her down to Nancy. Martha Henderson held the negro by will and deed of gift made in the year 1823. Elisha Perryman obtained possession of

Raines et ux. et al. vs. Perryman.

said negro by moving David Perryman and family into his house in 1831, and said that he held her for loaned money—four hundred dollars—two hundred of which had been repaid to him. James Fretwell was the brother-in-law of Nancy Perryman, and was perfectly solvent in 1829. That David Perryman never considered the negro his, but said she was loaned to his wife. When they first knew Malinda, in the year 1821, she was in the possession of John Henderson.

Defendant's counsel objected to this proof going to the jury, on the ground that it appeared from the answers of the witnesses, that Martha Henderson held the negro by will and a deed of gift, referred to by witnesses, and that said will and deed being higher evidence, should be produced. The Court sustained the objection, and plaintiffs excepted.

Plaintiffs then offered in evidence the will of John Henderson, the fifth clause of which, and upon which they relied, was as follows :

"I confirm unto my daughter, Martha Henderson the land and negroes given her by me, in a deed of gift bearing date 29th July, 1823, and vest in her the right of said negroes and land."

To the introduction of which defendant objected, upon the ground that reference was made in said will to a deed of gift, which should be first produced. The Court sustained the objection, and plaintiffs excepted.

Plaintiffs then proposed to show, that John Henderson had said that he had willed Malinda to Martha Henderson. Upon objection, the Court repelled this evidence, and plaintiffs excepted.

Plaintiffs then proposed to show, that defendant had admitted the title of James Fretwell, and to this end offered the depositions of certain witnesses. The Court refused, upon objection, to allow the depositions to be read, and plaintiffs excepted.

Here plaintiffs closed, and the defendant offered no evidence.

The Court charged the jury as follows: "Plaintiff in trover must show title in himself before he can recover; and in this case, if they should believe from the evidence, that James Fretwell, under whom the plaintiffs claimed, was not in possession of the property, and never had been in possession then they should find for the defendant." To all of which charge plaintiffs excepted.

The jury returned a verdict for defendant; whereupon, counsel for plaintiffs tendered their bill of exceptions, assigning as error, the rulings, decisions and charges aforesaid excepted to.

JUNIUS WINGFIELD; E. A. NESBIT, for plaintiffs in error.

J. ADAMS; and N. G. FOSTER, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the opinion of the Court below, on the motion for a nonsuit, right?

[1.] At the time when that motion was made, the only evidence to show title in the plaintiffs, was the deed from James Fretwell to Cullen Fretwell conveying the slave to him in trust for Nancy Perryman, during her life, and afterwards, for her children. And there was evidence to show, that James Fretwell, though he made this deed, had never been in possession of the slave. There was no evidence to show, that he then had, or that he ever had had any title to the slave. Thus stood the case, at the time when a motion for a nonsuit was made. The Judge announced, that he would sustain the motion, unless further evidence was offered. And we think, that he was right. The plaintiffs claimed under James Fretwell. If he never had title, he could give them none. He never had title. The evidence thereon, being the best. Therefore, they had none.

The plaintiffs then, acting on this announcement of the

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Judge, attempted, by further evidence, to show title in James Fretwell.

And first, they offered the interrogatories of Cullen and Elizabeth Fretwell.

These two witnesses swore, that Martha Henderson, the daughter of John Henderson, became the wife of James Fretwell; that the slave Malinda, originally, belonged to John Henderson; that they heard him say, in 1824, that he had given Malinda, to his daughter Martha. But they also swore, that he made this gift to Martha, by will and deed of gift. The Court excluded the interrogatories—holding that the interrogatories showed that there was better evidence of the gift to Martha, than the sayings of John Henderson, viz: the will and the deed of gift. And we think, that the Court was right. It is true, that the interrogatories did show, that there was a will and a deed of gift of John Henderson, which conveyed the slave to his daughter Martha. A deed or a will is higher evidence than sayings. And it is a rule of law, that when the existence of superior evidence is shown, inferior evidence shall not be received, until it be also shown, that the superior is unattainable. It was not shown, that the deed or will was not attainable.

[3.] Secondly, the plaintiffs offered the will of John Henderson, of which the fifth clause was as follows :

“ I confirm, unto my daughter, Martha Henderson, the land and negroes given her, by me, in a deed of gift, bearing date 29th July, 1823; and vest in her, the right of said negroes and land.” The Court held, that this will should be excluded, until the deed of gift to which, it refers, should be produced. And we think, that the Court was again right. The will did not, itself, identify the negroes, but referred to the deed, as that by which they were to be identified. The will, therefore, did not, by itself, show, that Malinda, the slave in dispute, was one of the negroes, it gave to Martha Henderson; it did show, however, that that was a matter to be settled by the deed. On that point, then—the point, wheth-

er Malinda was one of the negroes covered by this clause of the will or not—the deed was the highest evidence. The deed was not produced; no excuse was offered for its non-production. Under the rule aforesaid of the best evidence, the Court was, therefore, we think, required to exclude the will.

[4.] Thirdly, the plaintiffs offered to establish title in James Fretwell, by showing, that he, Fretwell, had said, that the girl Malinda, was his; in other words, by showing, that Fretwell, whilst admitting, that he had never been in possession of Malinda, yet claimed title to her. This, they offered to establish, by the interrogatories of James Fretwell himself. In those interrogatories, he swore, that he had never had possession of the slave, and yet, that she was his; but he also swore to matters which made it clear, that this, his claim to the slave, was a claim under the will of John Henderson. That will, then, was better evidence of his title, than his verbal assertion that he had a title under the will.

This verbal assertion was, therefore, to be excluded, under the rule aforesaid, until the will should be produced, or its non-production be accounted for. The Court did exclude it. We think, therefore, that the Court did right.

The charge of the Court, was but a repetition of the opinion of the Court, announced on the motion for a nonsuit. The charge was, therefore, we think, right.

In conclusion, it may be remarked, that according to the disclosures of the evidence in this case, the title to the slave, is not in Elisha Perryman, but in the *legal representative* of David Perryman. Those disclosures show, that Elisha received the slave, from David, to secure the payment of a loan of \$400—of which \$200 has been repaid; they show also that the hire of the slaves thus far, has been more than sufficient to pay off the remaining \$200.

Should the legal representative of David, recover the slaves, the present plaintiffs may, perhaps, assert against *him*, the title which they have been trying to assert against Elisha

• Melins, Currie & Sherwood, and Herring, vs. Horne.

Perryman ; if they can and should do that, they may, by bringing forward their higher evidence, have better success, than they have had in this suit.

Judgment affirmed.

MELINS, CURRIE & SHERWOOD, plaintiffs in error, vs. CROSBY J. HORNE, defendant in error.

SILAS C. HERRING, plaintiff in error, vs. CROSBY J. HORNE, defendant in error.

An appeal from a confession of judgment, reserving the right of appeal, is good although no juries were in attendance on the Court at which, the confession was made.

Assumpsit, in Lownds Superior Court. Decision by Judge COCHRAN, June, 1859.

These two cases being against the same party, and involving the same legal questions, were heard and decided together.

These cases were brought in the Inferior Court, and at the second or trial Term in said Court, defendant confessed judgment, reserving the right of appeal, and the cases were accordingly transferred to the appeal in the Superior Court, as provided by law.

Upon the call of the cases for trial, at June Term, 1859, defendant moved to dismiss the appeals, on the ground that, at the Term of the Inferior Court when the confessions of judgment were made, no jury was drawn or empaneled.

It appeared that both cases were issued and returnable to the February Term, 1858, of Lownds Inferior Court. **That**

Melias, Currie & Sherwood, and Herring, vs. Horne.

the court-house of said county was burnt, with all the records of the Courts, in June, 1858. That at the succeeding regular Term of said Inferior Court, on the first Monday in August, 1858, it being the trial Term of said causes, no jury was in attendance—none having been drawn or empaneled—but a majority of the Justices of said Court were present, and held the Court and transacted the business before them; and that these cases were then called in their order, and plaintiffs, by their counsel, confessed judgments in said cases, respectively, to defendant, reserving the right of appeal, and that plaintiffs gave the bonds required by law, and paid all cost, &c.

The presiding Judge granted the motion, and dismissed the appeal in both cases, on the ground that there was no jury drawn or empaneled at said Term of the Inferior Court, when said confessions were made and appeals entered, and consequently, no judgment could be rendered at or by said Inferior Court, from which an appeal could be taken.

To which decision counsel for plaintiffs excepted.

A. P. WRIGHT; and SEWARD, for plaintiffs error.

MORGAN; and HUNTER, *contra*.

By the Court.—BENNING J. delivering the opinion.

Were the appeals good? If so, the judgments dismissing them, were erroneous.

The appeals were good, if the confessions of judgment were good, and if appeal lies from a confession of judgment—this may be assumed.

The confessions of judgment were good. What has the presence of a jury, to do with a confession of judgment? Nothing. Confession of judgment is a substitute for verdict.

And a Court is a Court, notwithstanding, it lack a jury. Many judicial acts may be done without a jury. Receiving a confession of judgment is one of them.

Bonner vs. Little.

Appeal lies from a confession of judgment ; at least, it does, when the right of appeal, is reserved in the confession ; and that right was reserved in this case. *Nisbet vs. Lawson*, 1 *Kelly*, 275 ; 5 *Ga.* 298.

We think, then, that the judgments dismissing the appeals were erroneous.

Judgments reversed.

OLIVER H. P. BONNER, et al., trustees, claimants, plaintiffs in error, vs. KINCHEN LITTLE, plaintiff in *fi. fa.*, defendant in error.

In claim cases, where there is a legal affidavit of claim, and also a legal claim bond, a forthcoming bond is not necessary to the hearing of the claim—and the claim will not be dismissed upon the ground, that the Sheriff has turned over the property to the claimant without taking a forthcoming bond.

Claim, in Putnam Superior Court. Decision by Judge HARDEMAN, at September Term, 1859.

This was a claim interposed by Oliver H. P. Bonner and Richard W. Bonner, trustees of Nancy C. Andrews, to a negro woman named Mary, levied on under and by virtue of a *fi. facias*, in favor of Kinchen Little, against James G. Andrews, Thomas G. Andrews, and John D. Diomatari ; the negro was levied on by the Sheriff as the property of James G. Andrews.

At the trial, upon the call of the case, counsel for plaintiff in *fi. fa.*, Little, moved to dismiss the claim upon the ground

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that claimants had failed to give or file a forthcoming bond, as required by law in such cases. After argument, the Court granted the motion and dismissed the claim, to which decision counsel for claimants excepted.

JUNIUS WINGFIELD, for plaintiffs in error.

GEORGE T. BARTLETT, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

We think it is very plain that under our claim laws, the *claim* is perfectly well made when the claimant has made the legal affidavit, and given the requisite claim bond for damages, &c. The forthcoming bond is a privilege to the claimant, and not a requisite with which he must comply. By it he has a right to the possession of the property until the sale; if he can get that possession without it, that is a matter between him and the Sheriff, not affecting in the slightest degree the interest of the plaintiff in execution. The judgment dismissing the claim in this case, must be reversed.

Judgment reversed.

GREENE H. THOMPSON, plaintiff in error, vs. WILLIAM A. WILSON, defendant in error.

Knowledge of a matter, was acquired by an attorney at law, from the plaintiff, during the existence of the relationship of attorney and client, between him and the *defendant*.

Held, That he was competent to testify concerning the matter, as a witness for the defendant.

Thompson vs. Wilson.

Assumpsit, in Greene Superior Court. Tried before Judge HARDEMAN, at September Term, 1859.

This was an action of assumpsit by William A. Wilson, against Greene H. Thompson, on a promissory note, dated 24th May, 1855, for two hundred and five dollars and sixty-two cents, payable one day after date, to said Thompson or bearer.

The defendant pleaded the general issue, and failure of consideration, in this, that the property purchased of plaintiff by defendant, and which constituted the principal part of the consideration of said note, was not the property of plaintiff, but owned and held by him in partnership with another, and that said plaintiff was the owner of but one-half of the same, whereas, he represented that he was the sole and exclusive owner thereof, and defendant purchased upon that representation.

At the trial, plaintiff offered in evidence the note sued on, and closed.

The defendant's attorney, *F. C. Fuller, Esq.*, offered himself as a witness for defendant, to prove that the consideration in part of the note sued on, was the balance of the purchase money of certain horses, buggies and other things incident to a livery stable, and a mail contract, the knowledge of which facts was acquired by the witness from the plaintiff, who voluntarily brought the note to him for collection after he had been retained by defendant, and communicated the facts proposed to be testified to.

Plaintiff objected to the witness, and the testimony proposed, on the ground that he was an attorney in the cause, and that the facts proposed to be testified to, came to his knowledge during the existence of the relationship of client and attorney. The Court sustained the objection and repelled the testimony, and counsel for defendant excepted.

Defendant then called the plaintiff as a witness, who, up-

on the direct examination, testified, that the note sued on was given for the balance due on an account exhibited. That the discrepancy between the amounts of the note and the balance of the account, was owing to another small note being added, due to him by defendant; that he signed said contract; that his brother owned one-half the property at the time of the sale to defendant.

Cross-Examined.—He testified, that at the time of the sale, his brother, D. W. Wilson, was his partner, and owned a half interest of the property sold to defendant; that he paid over all the money he received on the mail contract specified in the written contract, to said D. W. Wilson, partner of defendant, and took his receipt therefor; he signed said contract exhibited to him the year after he sold the property specified in it; he sold one-half the property only; the amounts charged for the property was a fair value for the entire interest; he considered the whole property worth a thousand dollars; considered the mail line worth a thousand dollars, but sold his interest, being a half interest in the whole property, for one thousand dollars; that he has run the mail line specified in said contract; that the whole income was \$2,200 *per annum*; the expense of running about \$1,200 or \$1,300; that he sold the note prior to the suit, and took it up again; never told defendant that he would not make him pay it; never told the purchaser of the note why he took it up. He considered the whole property at the time of the sale, worth \$2,000.

Defendant objected to all such parts of the foregoing testimony, elicited on cross examination, as went to show that plaintiff sold only a half interest in said property, on the ground, that it altered or varied the terms of the written contract.

The Court overruled the objection and admitted the testimony, and counsel for defendant excepted.

Defendant then introduced in evidence the paper or ac-

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count, denominated by the witnesses the "*written contract*," as follows:

G. H. THOMPSON,

Bought of WILLIAM A. WILSON,

1855.

May 24th.	1 Hack,	-	-	-	-	-	-	\$ 75
	2 sorrel horses, (Gumbo and Shanghai)							
	\$75 each,	-	-	-	-	-	-	\$ 150
	1 bay mare, (Puss,)	-	-	-	-	-	-	65
	1 sorrel horse, (Fox,)	-	-	-	-	-	-	80
	2 old Buggies,	-	-	-	-	-	-	75
	1 old Barouche,	-	-	-	-	-	-	50
	1 bay horse, (Bob,)	-	-	-	-	-	-	75
	His interest in crop of corn, 75 acres, more or less,							150
								<hr/> \$700

One mail contract, running from Greensboro' to Scull Shoals, ending July 1st, 1855.

Also, the mail contract, commencing 1st July, 1855, and ending 1st July, 1859.

May 20. Received of Greene H. Thompson, in cash, \$806, and one note given on 24th day of May, for \$194, making in all \$1,000.

(Signed,)

WM. A. WILSON.

John T. Dolvin, sworn for the defendant, testified: That he knew the property, and thinks that the prices specified, were full prices for the entire interest; thought the mail contract from Greensboro' to Penfield, worth nothing; that to Scull Shoals, worth less.

James M. Langford, for defendant, swore that the property was specified in said *contract* at full prices. That the mail line *might* be worth a thousand dollars; he had run the line several years and made nothing; did not think the contract worth anything.

Thompson vs. Wilson.

Plaintiff offered to read in reply, the depositions of Nicholas H. Wilson, his brother. To which counsel for defendant objected, on the ground that the contract for the sale of said property being in writing, the effect of the testimony proposed, was to change and alter the terms of said contract.

The Court overruled the objection, and admitted the depositions, to which decision counsel for defendant excepted.

The cause being submitted to the jury, they found for the plaintiff the full amount of the note.

Whereupon, counsel for defendant tendered their bill of exceptions, assigning as error the rulings and decision aforesaid excepted to.

T. R. R. COBB; and F. C. FULLER, for plaintiff in error.

PHILIP B. ROBINSON, *contra*.

By the Court.—BENNING J. delivering the opinion.

To render an attorney incompetent to testify concerning a matter, knowledge of it, must have come to him, "from his client, or during the existence, and by reason of the relationship of client and attorney." *Cobb*, 280.

Knowledge of the matter about which, it was desired to question Mr. Fuller, the attorney for Thompson, did not come to him, from Thompson, and although, it may be, that it came to him, during the existence of the relationship of client and attorney, between him and Thompson, yet it did not do so, by *reason* of that relationship. That he was Thompson's attorney, was rather a reason calculated to prevent such knowledge from coming to him; for, as Thompson's attorney, he was of course, one of the last men, to whom Wilson would, if he had known that fact, have communicated any information relating to the case.

Yet the Court below, held Fuller incompetent. We think, therefore, that it held wrong.

Thompson vs. Wilson.

Was the Court right in admitting the evidence of the two Wilsons? We think so.

The objection made to this evidence, was, that it varied the written contract. But it is not true, that there was any written contract. What the plaintiff in error, seems to regard as a written contract, is nothing but *an account* in favor of Wilson, against Thompson. An account is not a contract, it is the act of but one of the parties to the sale or transaction, certainly it is not a contract in writing.

The objection then, was not true in point of fact. Consequently it was not good.

New trial granted on the first exception.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATHENS,
NOVEMBER TERM, 1859.

Present—JOSEPH H. LUMPKIN,
HENRY L. BENNING,
LINTON STEPHENS, } Judges.

**HORATIO J. Goss, Jr. and WIFE, plaintiffs in error, vs. JOHN
EBERHART, administrator, et al., defendants in error.**

W. H. B. gave to each of his daughters, by will, certain property, "to them and their children, heirs of their body."

Held, That the daughters took respectively, an estate for life, remainder to their children, born and to be born, at their death.

In Equity, in Elbert Superior Court. Tried before Judge
THOMAS, September Term, 1859.

This was a bill filed for direction, by John Eberhart, administrator of William F. Eberhart, deceased, against Horatio J. Goss, Jr., and his wife, Melita Goss, and William B. Eberhart and Zilla A. Eberhart, infant children of Mrs. Goss, by a former husband, the said William F. Eberhart, deceased, complainant's intestate.

The bill states that William H. Barnett, deceased, late of

Goss and wife vs. Eberhart, adm'r.

the State of Alabama, died, leaving a will, the fourth and sixth items of which, were as follows, and for the proper construction and execution of which, the direction of the Court is sought, viz :

Item Fourth. My will and desire is, that my negroes, not otherwise disposed of, shall be equally divided between my six children, hereafter named, to-wit : Francina E. Matthews, wife of Robert C. Matthews; *Melita S. Eberhart, wife of William F. Eberhart* ; Martha S. Colquitt, wife of William T. Colquitt ; Eliza E. Barnett, Zilla A. Barnett, and William B. Barnett, so as to make them all equal, except my daughter Nancy, to whom I have given ten dollars, which is all she is to receive from my estate; and to my son William B. Barnett, I have given him three negroes, and gold watch as above named.

Item Sixth. My will and desire is, and I do hereby give and bequeath all of the property of every description, that I have given, or may hereafter give, to each of my daughters, I give to them and their children, heirs of their body, and not subject to be sold by their respective husbands, or liable for debts in any manner whatever.

The bill further states, that complainant, as the administrator of William F. Eberhart, has possession of eight negro slaves, received by said Eberhart in right of his wife, under the foregoing clauses of the will of William H. Barnett, deceased. That the said intestate William F. Eberhart, left as his heirs at law and distributees, his widow, the said Melita S., (who has since intermarried with Horatio J. Goss, Jr.,) and two infant children of tender years, to-wit : William B. Eberhart and Zillah A. Eberhart.

The questions were, whether Mrs. Eberhart took an absolute estate in the property bequeathed, or whether she took as a joint tenant or tenant in common with all her children, as well those born as to be born, or whether she took an estate for life, remainder to her children.

The defendants answered the bill, admitting all the facts therein stated.

The cause was submitted to the jury upon the bill and answers.

Counsel for the defendants, Goss and wife, requested the Court to charge the jury, that under the fourth and sixth clauses of the will of William H. Barnett, deceased, the property therein bequeathed to Melita S. Eberhart, (now Mrs. Goss,) vested in her absolutely; and, if not, then to charge, that she had a life estate in said property, with remainder to her children, born and to be born.

Which charge the Court refused to give, but charged that the property belonged to Mrs. Goss, and all her children, present and future, as tenants in common. To which charge and refusal to charge, counsel for Goss and wife excepted.

The jury returned a verdict in conformity with the charge and instructions of the presiding Judge. Whereupon, counsel for Goss and wife, tendered their bill of exceptions, assigning as error the charge and refusal to charge aforesaid.

HESTER & AKERMAN, for plaintiffs in error.

REESE; and T. R. R. COBB, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The question in this case, arises upon the construction of the 6th item of the will of the late William H. Barnett.

The testator having in the previous parts of his will, disposed of his property to his wife and children, proceeds thus: "My will and desire is, and I do hereby give and bequeath all of the property of every description, that I have given or may hereafter give, to each of my daughters, I give to them and their children, heirs of their body, and not subject to be sold by their respective husbands, or liable for their debts, in any manner whatever."

Goss and wife vs. Eberhart, adm'r.

His daughter Melita S. Eberhart, wife of William F. Eberhart, had two children at the date of the will, and at the death of the testator; William F. Eberhart has since died, and the widow has intermarried with Horatio J. Goss, Jr., by whom she has one child.

The administrator of William F. Eberhart, finding the negroes received under the will of William H. Barnett in the possession of his intestate at the time of his death, took possession thereof, as a part of his estate; and filed the present bill, asking the direction of the Court respecting this property.

It is insisted by counsel for the plaintiff in error, that the words create an estate tail in Mrs. Eberhart, and that hence under the law, she took an absolute fee in it. The antagonistic view to this, and the one held by the Court, is, that Mrs. Eberhart took as tenant in common with her children, born and to be born.

Without stopping to controvert both, or either of these positions, I would remark, that to maintain the first, namely, to make this an estate tail, the words "children" in the will, must be wholly disregarded. And so on the other hand, to support the position of the defendant in error, and the decision of the Circuit Court, the word "heirs," must be ignored.

But it is not allowable thus to mutilate an instrument, whether deed or will. On the contrary, it is our duty to give effect to all the words, if possible. Here it is not only possible, but by doing so, we ascertain the true meaning of the testator. He gives the property to his daughter and her children, heirs of her body. Now no one is the heir of the living. The employment of this term therefore, indicates, *that* the children were not to take a present estate, but one *that* should come to them after the death of their mother.

Our construction then is, that the daughter, Mrs. Eberhart, took a separate life estate, with remainder to such children, born and to be born, as survived her. And this case seems to be identical almost with that of *Crawford against Trot-*

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ter, wherein, a legacy of £100 stock was bequeathed to Lady Scott and her heirs, (say children.) In the case at bar, it is to her children, heirs of her body, just reversing the collocation of the words. Sir John Leach, V. C., was of opinion, that Lady Scott was entitled for life, remainder to her children, the word "heirs," which was synonymous with children, importing that they were to take after her death. (4 *Madd.* 361; *Burdett vs. Young*, 9 *Mad.* 93; 3 *Bro. P. C.*, 50, *S. C.*)

I would only add, that where the construction is doubtful, the Courts lean to the implication of life estates.

THOMAS B. GAY, plaintiff in error, vs. SHEROD H. GAY, defendant in error.

- [1.] An assent to the life estate is an assent to the devise over, whether it be a vested or contingent remainder.
- [2.] If, after the death of the first taker, the executor by the will has a trust to perform, arising out of the property, the rule would not hold; for in that case the property must be subject to his control, and of course he must have the legal title.
- [3.] When slaves are directed by the will to be divided between the remaindermen, and they are left by the tenant for life, in possession of one of the tenants in common, he is a fit and proper person to institute proceedings to make the division.

Appeal from the Ordinary, on application for letters testamentary, in Clark Superior Court. Decision by Judge HUTCHINS, at August Term, 1859.

This was an application to the Court of Ordinary of Clark county, by the plaintiff in error, for letters testamentary on the estate of Robert Sims, deceased. This application was resisted by the defendant in error, who filed a caveat to the same. The case coming on for trial in the Superior Court

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on appeal from the Ordinary, was submitted upon the following agreed statement of facts, viz :

That Robert Sims died, leaving in full force his last will and testament, whereby he devised and bequeathed his estate to his wife for life, remainder to his brother's children, and appointed his wife Johanna Sims executrix, and Gilbert Gay and Thomas B. Gay executors of said will. That his wife, the said Johanna, alone qualified, and took upon herself the execution of the will, paid the debts of the estate, and as tenant for life, took possession of the entire property. That in the latter part of the year 1856, the said Thomas B. Gay renounced the executorship of said will; that at that time the said Johanna, being very old and unable to manage said property, Sherod H. Gay, the caveator, at her request, and with the consent of the said Thomas B. Gay, took her and her personal property into his possession, and removed them from the county of Clark to the county of Fayette, where the said Johanna remained until her death, which occurred 9th September, 1858. That after the death of the said Johanna, the property continued in the possession of the said Sherod H. Gay, who being one of the remaindermen under said will, filed his bill in chancery, asking the aid and direction of that Court in the distribution of the property amongst all the remaindermen.

That after Mrs. Sims's death, and the filing said bill in equity, Thomas B. Gay proposed to withdraw and revoke his renunciation of the executorship of said will, and to qualify as executor thereof; which application was made to the February Term, 1859, of the Court of Ordinary of Clark county, and opposed and resisted by the said Sherod H. Gay. It was further agreed that William Gay, whose heirs are, by said will, entitled to a part of said estate in remainder, departed this life before the death of Mrs. Sims.

Upon the foregoing facts, the following points were made and submitted for the decision and judgment of the Court below :

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1st. Whether the said Thomas B. Gay may retract his renunciation of executorship and now qualify.

2d. If he may, whether under the will of Robert Sims, deceased, and the facts aforesaid, there is any estate of Robert Sims, deceased, unadministered, or whether the entire estate and all interest therein, has not passed and become vested in the remaindermen.

3d. Whether a Court of Equity may not, under the facts aforesaid, entertain jurisdiction, and make distribution amongst the remaindermen, without further administration.

The following are the clauses in the will of Robert Sims, deceased above referred to :

“*First.* I leave all my estate, both real and personal, to my beloved wife, Johanna Sims, during her natural lifetime, and to be used by her and for her support and benefit, as she may think proper, after paying all my just debts and funeral expenses.

“*Second.* After the decease of my beloved wife, as aforesaid, I want the slaves, that shall then belong to the estate freed, if the laws of our country will authorize it. If not, I want the estate, both real and personal, equally divided between the heirs of Daniel Carter and John Sims, of Rockingham county, North Carolina, also, the heirs of Allen, Joshua, Gilbert, William, and Thomas Gay, Joseph Thompson and Jeremiah Walker.”

After argument, the presiding Judge held and adjudged, that the will of Robert Sims, deceased, had been fully executed, and that no part of his estate remained unadministered, and refused the letters testamentary. To which decision counsel for applicant excepted, and assigns the same as error.

T. R. R. COBB, for plaintiff in error.

TIDWELL & WALKER, *contra.*

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By the Court.—LUMPKIN J. delivering the opinion.

Counsel for the caveator and defendant in error waive the question as to the right of the plaintiff in error to retract his renunciation of the office of executor, and insist only upon the ground, that the estate of the testator was fully administered. And we concur with the Circuit Judge upon this point.

When the executor assents to the life estate, it is an assent to the devise over, whether it be a vested or contingent remainder. If it be a vested remainder, the assent is absolute; if contingent, it is qualified—that is, it is subject to the condition upon which the remainder is to vest. Here, the condition or contingency annexed has happened, and hence the qualified assent has become absolute. 1 *Comyn's Dig. Title Administration, letter C. p. 354*; 3 *Iredell's Eq. Rep. 554*, and the authorities there cited; 5 *Iredell's Law Rep. 87*.

If the executor had, in this case, a trust to perform, arising out of the property, after the death of the tenant for life, this rule would not hold. For in that case, the property must be subject to his control, and of course he must have the legal title. But according to the provisions of this will, there is nothing to do but to divide the slaves amongst the remaindermen. And this can be as well done under the bill already filed by one of the tenants in common for that purpose and with whom the property was left at the death of the tenant for life. as by an executor.

Judgment affirmed.

EMMA INGRAM and ELLA INGRAM, (by their next friend,) plaintiffs in error, vs. WILLIAM FRALEY, executor, &c., defendant in error.

"I, LaFayette Ingram, make the following disposition of my property: Owing to the peculiar condition of my property, and being desirous of keeping my negroes together as long as it can be done, and having the utmost confidence in my long tried friend, William Fraley, that he will entirely carry out my wishes and desires, as they may be expressed by me, either verbally or in writing; and well knowing that my said friend will, by this will, be able much more effectually to dispose of my estate, as I wish it done, than I could at this time do myself, and with much less trouble to himself, I hereby give to the said Fraley my entire estate, real and personal, notes and other debts due me, money and property of every kind.

"I nominate, constitute and appoint my friend William Fraley, executor of this my will, hereby revoking any and all former wills by me made, and declare this to be my only last will and testament."

Held, That the words accompanying the bequest in this will, created a trust, and would, had the trust been sufficiently declared, excluded all discretion in the legatee; but the testator having failed to declare the trust, the legatee did not take the estate beneficially, but held the same as trustee for the next of kin of the deceased.

In Equity, in Hancock Superior Court. Tried before Judge THOMAS, at October Term, 1859.

This was a bill filed by Emma Ingram and Ella Ingram, by their next friend, against William Fraley, for a discovery and account of the estate of LaFayette Ingram, deceased, and that defendant be decreed to pay over to complainants their distributive share thereof, as heirs at law of decedent, they being the children of a deceased brother.

Defendant resisted this demand on the ground that LaFayette Ingram departed this life, leaving in full force his last will and testament, whereby he devised and bequeathed his entire estate to defendant, and that complainants had no right, title or interest in or to the same, or any part thereof.

The following is a copy of the will of LaFayette Ingram, deceased, under and by virtue of which defendant claimed the estate aforesaid, to-wit:

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“STATE OF GEORGIA, HANCOCK COUNTY.

I, LaFayette Ingram, of the State and county aforesaid, being at this time sick, but of sound and disposing mind and memory, do make the following disposition of my property: Owing to the peculiar condition of my property, and being desirous of keeping my negroes together, as long as it can be done; and having the utmost confidence in the integrity of my long tried friend, William Fraley, of said county, and that he will entirely carry out my wishes and desires, as they may be expressed to him by me, either verbally or in writing; and knowing that my said friend will, by this will, be able much more effectually to dispose of my estate, as I wish it done, than I could at this time do myself, and with much less trouble to himself, I hereby give to the said Fraley my entire estate, real and personal, notes and other debts due me, money and property of every kind.

I nominate, constitute and appoint my friend William Fraley, executor of this my said will, hereby revoking any and all former wills by me made, and declaring this to be my only true last will and testament.

I have hereto subscribed my name and affixed my seal, this 10th day of July, 1856.

(Signed) LAFAYETTE INGRAM. [L. s.]

Signed, sealed and declared by the testator to be his last will and testament, who, in his presence, and in the presence of each other, have hereto subscribed our names as witnesses. The words “than I could at this time do myself,” interlined before signing by the testator or witnesses.

E. W. ALFRIEND,

R. GOODLOE HARPER,

ELIZABETH HARPER.”

Complainants' counsel opened their case by reading the bill and answer.

Defendant's counsel submitted the following statement of facts agreed upon by counsel on both sides, viz:

That testator and William Fraley were brothers-in-law—the latter having married testator's sister in the year 1828. Upon the death of testator's father, testator and defendant, about the year 1832, purchased jointly the plantation of their deceased ancestor, and placed their negroes on it; they have subsequently bought jointly small adjacent pieces of land; they have farmed together from the year 1832 to the time of Ingram's death; they purchased jointly, in the mean time, a family of negroes placed on the farm; their negroes have intermarried, and become mixed in families for more than one generation. Testator was a bachelor; lived on the farm; encouraged this intermarriage, and treated all the negroes with like humanity and attention. William Fraley lived in the village of Sparta, and furnished some things that had to be bought off of the farm; sold most of the cotton crops, and managed chiefly the outside business; Ingram sold such things as grain, &c., sold and delivered at the plantation. Testator and defendant had their joint transactions, including a purchase of lands in Alabama, amounting to several thousands of dollars. Among the negroes on the plantation, were a family of mulattoes, to which testator, for reasons not necessary to be repeated, had a strong affection; the closest intimacy and fullest confidence existed between testator and defendant; Fraley's wife died before testator.

Defendant then introduced the following evidence:

Ingram Bass sworn, testified: That he lived with testator, working on the farm, in 1832 and 1833, and from 1835 to 1839 lived in a quarter of a mile of him; during that time knew of no settlement between Fraley and Ingram; was intimate with Ingram; he talked freely with witness as with any one; heard of no settlement between Ingram and Fraley.

Henry T. Fraley testified; That he lived with his uncle, the testator; went there to live in 1846 or 1847, after witness quit school; prior to that time spent his vacations with him; lived in the house with him three or four years after 1846; knows of no settlement between my uncle and my father, the

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defendant; my uncle told me frequently that there never was any settlement; told me as a reason that there never was any settlement, that he never intended to divide his property, or separate his negroes; he intended to leave it to his sister's children; had no sister but my mother; heard him say the night before he made his will, that he *did not* want his property to go to Alabama; that he was willing to die but if he was to die that night, part of his property would go there.

Cross-examined.—Witness told him he might make his will any time he wanted; he said he did not want it to go to Alabama; he was very ill; he died about two days after the will was made; after he made his will he had no conversation with me about his property; when witness left him, he was talking with witness's father; it may have been twelve months before his death that he said he intended to give his property to his sister's children; not able to fix the time.

LaFayette Fraley testified: That the morning testator made his will, and after it was made, the others went out of the room; he asked witness to hand him a gourd of water; he said he did not want his property to go to Alabama.

All that portion of the foregoing testimony, relating to the sayings of the testator, were ruled out and excluded by the presiding Judge, from the consideration of the jury.

The Court charged the jury, that the will contained a valid disposition of the estate of LaFayette Ingram, deceased, and vested the same absolutely in William Fraley, the legatee therein named, and that complainants were not entitled to recover. To which charge complainants excepted.

The jury, under the charge aforesaid, found for the *defendant*. Whereupon, counsel for complainants tender their bill of exceptions, assigning as error the charge aforesaid.

J. WINGFIELD; ALEX. H. STEPHENS; and ROBT. TOMBS,
for plaintiffs in error.

B. H. HILL; and T. R. R. COBB, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

It will be conceded that the words used in this will, are sufficient to vest the legal title to the property in William Fraley. And the question is whether, from the whole will, we are bound to infer it was not the intention of the testator to give it to him absolutely, but on the contrary, that a trust was intended. If so, William Fraley, the legatee, will be excluded from taking any beneficial interest under the will.

I have neither the time nor the inclination to review the library of volumes read on the argument. The numerous decisions upon this question, have been thoroughly examined by the able and distinguished counsel who have argued the case. And the conclusion to be drawn from this thorough review is, that so infinitely various are the forms of expression used by testators, that all that remains for the Courts to do, is to determine, upon the terms employed in each particular case, whether an absolute gift was intended, or was the legal title placed in the hands of the legatee, to enable him to carry out some fiduciary appointment respecting the property?

Where the testator declares expressly that he gives the property *upon trust*, and yet declares no trust, it is admitted there is no doubt or difficulty. It has long been established that, in such a case, the next of kin will take. And yet it must be conceded, that a fiduciary intent may be equally indicated by other expressions. And can it, we ask emphatically, make any difference when equivalent words are used? No particular words, we know, are necessary to create a trust. This is one of the elementary rules, under the head of Trusts. The books make no such distinction. It would be too unreasonable ever to find favor or foothold in the Courts.

If *Briggs against Penny* (8 Engl. L. & E. R. 231) be law, it settles this case conclusively for the plaintiffs in error. This is not disputed. There, the testatrix, Frances Harley, after giving to the legatee, Sarah Penny, certain pecuniary

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legacies, and making other bequests, gave all the rest, residue and remainder of her personal estate to Sarah Penny, her executors, administrators, and assigns, "well knowing that she would make a good use and dispose of it in a manner in accordance with her views and wishes." She nominated Sarah Penny her sole executrix, and declared, "that alone to be her last will and testament." The testatrix never formally declared her "views and wishes." Various papers were found in her handwriting, expressive of her "views and wishes;" and containing directions for Miss Penny, with regard to her property. But those papers were some of them void under the Mortmain Act, and none of them were admitted to probate.

It was held by the Vice-Chancellor, upon the construction of this will, that Miss Penny did not take the residue beneficially, but that it was a resulting trust in favor of the next of kin. And this decree was affirmed by the Chancellor, upon the appeal. It needs only to read the two wills to see how much stronger the case under consideration is than this.

But it is insisted that this case is contrary both to principle and precedent; and therefore, is not law. The learned and eminent counsel have failed, we think, in making good this assumption. It is in conflict with neither, but in accordance with both, when properly understood and applied. *Morice vs. the Bishop of Durham* (10 Ves. Ch. Rep. 522,) is admitted on all sides to lay down the true doctrine upon this subject. Let us test then this case by that.

Lord Eldon there distinctly held, that "if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created—is *not expressed at all—or fails*, the next of kin take." And "on the other hand, if the party is to take himself, it must be upon this ground, *according to the authorities*, that the testator did not intend to create a trust, but intended a gift to that person for his own use and benefit." To this sound and sensible rule the Court ad-

hered in *Briggs and Penny*, and by it we will abide in the case before us.

It is true that Lord Eldon did say that "it might perhaps *originally* have been as well to have held, that if the testator did not declare any trust, the person to whom the property was given should take it." Thus yielding implicitly, that the law was otherwise. And this great Judge will find few, we apprehend, to concur with him in the opinion, that where property is placed in the hands of another, for a particular purpose or person, that if the desire and design of the testator fails of accomplishment, for any cause, that the mere naked trustee or depository should, therefore, take and hold it for his own use and benefit, to the exclusion of the next of kin. Such a proposition is abhorrent to every one's sense of justice.

Where the language of the will is vague and indefinite as to the objects of the trust, this fact is legitimately used as an argument, to show, that no trust was intended to be created. This is relied on in *Morice vs. The Bishop of Durham*. And not denied in *Briggs vs. Penny*. But if the words in the latter, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes," were deemed sufficient to impose a trust in *Briggs vs. Penny*, a *multo fortiori* do the terms of Mr. Ingram's will necessarily import a trust.

"Having the utmost confidence in my long tried friend William Fraley, and that he will entirely carry out my wishes and desires, as they may be expressed to him, verbally or in writing, and knowing that my said friend will by this will be enabled, much more effectually to dispose of *my estate* as I wish it done than I could at this time do myself, and with much less trouble to himself, I hereby give," &c.

Can any one read or hear read this will, and contend, that it was the intention of the testator, to give his property to the legatee absolutely and for his own use and benefit. To arrive at such a conclusion, it must be by some arbitrary and

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technical rule of construction not patent to the common understanding. We know of none such ; nor do the adjudications furnish any.

This whole will is embraced in a single sentence. And it has been urged with much plausibility, and even force, that the recitation in the preface is nothing more than the reasons assigned by the testator, for making the bequest which follows. However specious this reasoning, we are not satisfied of its soundness. Either the testator had previously made known to Mr. Fraley his "wishes and desires," as to the disposition he intended him to make of his property, or he designed to do so, "verbally or in writing." Otherwise he could not say that he had entire confidence in his integrity, that he would carry them out fully. And what possible difference can there be between such a case, and that of a testator who gives all his estate to one *upon trust*, but never declares the trust? None that we can see.

And suppose the objects of the trust in this case were certain, and the plan of disposition also, would any Court hold, that the words of this will were not imperative, and its execution could not be enforced? Surely not. Chancery would decree, it has done often, upon words much less mandatory, that there was no discretion left to the legatee, but an obligation imposed upon his conscience by the will, not inclining him merely, but compelling him to execute the testator's purpose. Such, at any rate, is our interpretation of the will.

It has been ingeniously suggested that while the terms of this will might be sufficient to create a trust in an English will, still that consequence would not necessarily follow here. That there, the wish or desire of the testator was naturally supposed to be founded on and growing out of his affection for the object of his bounty, his legatee. He gave his land or his stock or his money, to his relative, his friend, or to charity; not for the love or regard he had for the thing given, but for the person to whom given; or the purpose for which he gave. But that this is not necessarily so in Geor-

gia. That it is not an uncommon thing for our people to cherish a strong affection for their negroes. Fidelity, association, mutual struggles and benefits, and many other causes, often produce warm attachments between master and slave, which must enter into the solicitude of the owner in determining and directing how his property shall be disposed of after his death. True, our laws prohibit manumission; but they do not forbid the master to permit his slave to select his future owner, and to express the desire, that husband and wife, parent and child, friends and relations, shall not be separated, but kept together as long as it can be done.

Grant all this. Counsel seem to have overlooked the fact, that a trust may have been contemplated for the benefit of *the slaves themselves*; and prompted by the very causes which he suggests. Nothing is more common in the slave States. Still if the testator failed to declare it, are not the next of kin equally entitled? We do not see, that this supposition helps the construction contended for, in behalf of the defendants in error.

And then, if we look to surrounding circumstances, as disclosed by the outside evidence, the case is plain. The parol proof was offered by Wm. Fraley, and rejected by the Court. That decision is excepted to; but the opposite counsel agree that it shall be considered by this Court without objection, and what does it establish? That the testator uniformly declared, that none of his *slaves*, should go to Alabama, or to the Ingrams, if you please, his brother's children, but that he intended to give them to his sister's children, the young Fraleys, *but not to their father, the legatee.*

I would remark in passing, that had he declared expressly, that the complainants in the bill, his heirs at law, should never inherit *any* portion of his estate, still they would take, unless it had been disposed of otherwise. (*Wright vs. Hicks*, 12 Ga. Rep. 155.) And we submit in all candor, if owing to the peculiar situation of the testator's property, and the par-

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amount wish and desire of his heart was, to keep his negroes together as long as possible, is it not much more probable, that he would have directed this to be done, until the youngest child of William Fraley became of age, and then to be divided between the offspring of his sister, than to have given them to their father unconditionally, who was an aged man; and at whose death, to say nothing of other contingencies, they would have been subject to a subdivision amongst his family?

And yet if this was the purpose in the mind of the testator, and he failed to declare it, the complainants would come in for the two-sixths of their uncle's estate, which they are seeking to recover; the four Fraley children taking the other four-sixths.

Wishing to meet this case in the strongest light in which it has been presented to sustain the judgment, we have foreborne to intimate several testamentary schemes which might have been in the testator's mind, in the disposition of his estate. To say nothing of any emancipation project, what is there effectually to combat the idea, that he intended his slaves for his sister's children, and to make up the portion of his nieces, out of his lands, notes and other effects?

But being convinced from the face of the will, that some trust was intended, without pretending to know or even to guess what that trust was, no more than we could have done, had the testator simply declared that he gave his property to William Fraley, *upon trust*, and there stopped; we are clear that the legatee takes nothing beneficially under the will of LaFayette Ingram, and that the estate is subject to distribution between the next of kin of the deceased.

Judgment reversed.

Judge STEPHENS having been of counsel in this case, prior to his promotion to the bench, did not preside.

WILLIAM H. ADAMS, et al., executors, propounders, plaintiffs in error, vs. JAMES M. SANDIGE and WIFE, caveators, defendants in error.

On an issue of will, or no will, the executor presented himself as a witness, to prove the affirmative; and, to render himself competent, he offered to deposit a sum sufficient to pay the costs.

Held, That he would still be interested in the event of the suit, to the extent of the costs, because, if he gained the case, the costs would come out of the other party, and he would get back his deposit.

Caveat to will, in Elbert Superior Court. Tried on appeal, before Judge THOMAS, September Term, 1859.

The plaintiffs in error, as executors of the last will and testament of William Pulliam, deceased, being cited to probate said will in solemn form, the defendants in error filed their caveat to the same, upon the following grounds, viz :

1st. Because, at the time said paper writing was executed, the deceased was not of sound and disposing mind and memory.

2d. Because deceased was unduly influenced to make, sign and acknowledge said paper.

3d. Because the contents of said paper were never read by deceased, or otherwise made known to him.

After trial and argument, the Ordinary pronounced for the will, and ordered the same to record and probate in solemn form of law; from which decision caveators appealed.

At the trial on the appeal, in the Superior Court, counsel for propounders proposed to examine as a witness, William H. Adams, one of the executors of said will, and who had qualified as such, the witness first offering to release and relinquish all his interest in the commissions due on the estate; to deposit whatever amount the Court should adjudge sufficient to pay all costs, and to purge himself by oath, that he had assumed no personal liabilities on account of or touching the estate of deceased. The presiding Judge ruled the

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witness incompetent, and repelled the testimony, and propounders excepted.

The testimony being closed, the Court charged the jury, who, thereupon, retired and found against the will. Whereupon, counsel for propounders tendered their bill of exceptions, assigning as error—

1st. The ruling of the Court refusing to allow Adams, one of the executors, to be sworn and examined as a witness in the cause, upon the terms and conditions above stated.

2d. The charge of the Court upon the subject of undue influence, when there was no evidence of any undue influence before the jury.

3d. The charge of the Court, "that the decisions of the Supreme Court must be enforced until repealed by the General Assembly," when there never had been any decision in this case by the Supreme Court.

VANDUZER; and TOOMBS, for plaintiffs in error.

HESTER & AKERMAN, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court right in holding, that Adams was incompetent to testify, for himself, and his co-executor, Maxwell?

We adhere to the opinion, that if a person is not interested in the event of the suit, he is competent to testify in the suit, although he may be a party to it. 19 Ga. 203; 18 Ga. 609; 22 Ga. 58.

The only question for us then, is, would Adams have been interested in the event of the suit, if his offer had been accepted by the Court, and complied with by himself.

First, suppose that so much of Adam's offer, as related to the deposit of a sum sufficient to pay the costs, had been accepted by the Court, and complied with by him, would that have relieved him from all interest in the event of the suit, so far as the costs were concerned? We think not. Sup-

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pose he and his co-executor had gained the case, what would have become of this deposit? It would have gone back to him, for, in that event, the payment of the costs, would have fallen upon the losing party, not on him and his co-executor. Consequently, Adams would still have been interested in the event of the suit, just as much as he would have been, if there had been no such deposit made. This is a result from the fact, that the offer was a thing coming from Adams, instead of from the legatees named in the will. If they had made a deposit of a sufficient sum, to pay the costs, the case would have been different; for the effect of such a deposit, would have been, that the costs should fall either, on the legatees, or on the caveators, and, therefore, that the costs could never fall on him, Adams. And in the case of *The Central Railroad vs. Hines, Perkins & Co.*, 19 Ga. *(supra)*, the deposit was made, not by the party himself offered as a witness, but by his co-parties—his former partners—he having sold out to them, after the commencement of the suit by the partnership. He, therefore, was in no danger from the costs.

We think, that Adams would still have been interested in the event of the suit, to the extent of the costs, if his offer as to the costs, had been accepted by the Court and complied with by him. If we are right in this, the offer was insufficient in that particular of it, which respected the costs; and if insufficient in that particular, it was to be rejected, no matter how sufficient it might be, in the other particulars. It is needless, therefore, to consider it in respect to those particulars.

The result is, that we affirm the judgment excluding Adams.

The next question is, was the Court right in charging, on undue influence. It is said, that there was no evidence of undue influence. We think, that there was some evidence on that point; that, at least, there was some evidence as to which, the caveators might have argued, that it showed

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undue influence. That was the evidence of Eaverson. It was not pretended, that the charge did not state the law of undue influence, correctly.

We cannot say, then, that the Court erred, in charging on the question of undue influence.

The third and last exception was abandoned.

Judgment affirmed.

JOHN VENABLE, plaintiff in error, vs. GILES MITCHELL, defendant in error.

The executor of a will is the proper administrator of the whole estate, as well of that part of which the will does not dispose, as of that disposed of by the will.

Appeal from Ordinary, in Jackson Superior Court. Decision by Judge HUTCHINS, at August Term, 1859.

This was an application by the plaintiff in error, for letters of administration on that portion of the estate of William D. Martin, deceased, contained in the sixth clause of the last will and testament of deceased, and which clause had been held and declared void under the statutes of the State prohibiting the emancipation of slaves, &c.

The Court of Ordinary ordered the letters to issue, holding that the deceased died intestate as to the property mentioned in said sixth clause, and that the same vested in his heirs at law, and did not go to the residuary legatee. From this judgment the defendant in error, Giles Mitchell, who was the executor of said will and residuary legatee, appealed, and the cause coming on to be heard in the Superior Court, on

the appeal, the presiding Judge of that Court (HUTCHINS) reversed the judgment of the Ordinary, holding that the residuary legatee was entitled to the property contained in said clause, and that there was consequently no estate to be administered.

To this decision Venable, the applicant, excepted and assigns the same as error.

GEO. HILLYER; and AKERMAN, for plaintiff in error.

COBB & LUMPKIN, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

This was an application for letters of administration *de bonis non*, founded upon the idea that the executor could not administer intestate estate. We think this idea is a mistake, for by our statute of 1828, (See *Cobb's Digest*, p. 327,) executors are directed to hold the "residuum or *undevised* real or personal estate as trustees for the distributees or next of kin of their deceased testator or testatrix." It is unnecessary to consider whether or not there is any intestacy in this case, for under this statute the executor is the proper administrator of the intestate as well as of the testate estate. There was no use, therefore, for an administrator *de bonis non*, and the application was properly refused.

Judgment affirmed.

Oliver vs. Persons.

TURNER P. OLIVER, plaintiff in error, vs. THOMAS F. PERSONS, defendant in error.

A Court of Chancery has power to allow a defendant to amend his answer, by striking out a part of it.

In Equity, in Warren Superior Court. Decision by Judge THOMAS, at October Term, 1859.

This was a bill filed by Turner P. Oliver, administrator, against Thomas F. Persons.

Counsel for defendant moved in this cause to amend the defendant's answer, filed on the 5th of August, 1855, by striking out the entire answer, and so much of a subsequent answer filed 15th April, 1857, as is in the last words and lines thereof, to-wit: "and also of his two previous answers and pleas in this case as though the same were written again, and here appropriately set forth, pleaded, and answered in apt words, and in proper form."

Counsel for complainant objected to the proposed amendment.

The Court overruled the objection and granted the motion allowing the amendment. To which decision, counsel for complainant excepted.

Defendant then moved to amend the minutes of said Superior Court at the April Term, 1855, in the following manner, and by granting the following order, to-wit:

Turner P. Oliver, administrator,	}	Bill for discovery, relief.
vs.		&c., in Warren Superior
Thomas F. Persons.		Court.

On motion, ordered that complainant's solicitors show cause at such time as it may suit the convenience of the Court to hear them, why the minutes of this Court at April Term, 1855, should not be amended by writing therein, *nunc pro tunc*, the following order granted in the above stated case at the Term aforesaid, to-wit:

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“Upon hearing the above stated rule, and it appearing to the Court that defendant had prepared a plea and answer in said cause which is submitted to said Court upon the first day of this Term, though not within the three months, nor had filed it on the first day of this Term; said answer purporting to be in full to all such facts of the bill not pleaded to, and moving at the same Term to be now permitted to file the said plea and answer. It is ordered that the said motion to file said plea and answer be overruled, and the first above stated order be granted.”

The foregoing rule having been served and the motion having been called up for determination, complainant's counsel objected to the allowance of the same.

A. H. Stephens, Esq., one of the counsel for the defendant, stated in his place, (it being agreed by counsel for complainant, that he need not be sworn,) that the Court at April Term, 1855, passed and granted an order which was now found among the papers in the case, and presented in Court, but which no where appeared on the minutes. The original order is in the handwriting of Mr. Stephens, and is interlined in the handwriting of Judge Cone, who at April Term, 1855, was the controlling and leading counsel in the case. That the motion was discussed by Judge Cone on one side, and himself on the other, and that the order was finally passed in the shape and form it now has.

The Court granted the order amending the minutes, *nunc pro tunc*, as above moved for, and counsel for complainant excepted.

DOUGHERTY, SPEER; and WASDEN & NELMS, for plaintiff
in error.

TOOMBS; and COBB, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right, in allowing the answer to be amended? We think so.

It was said in objection to that decision, that there is an English chancery rule, which forbids the amending of an answer, and substitutes for amending, the right to file a supplemental answer. But if there is any such rule as this, it is one that was made by Lord Chancellor Thurlow, since the revolutionary war. Therefore, it is not binding on us. Besides, if one Chancellor can make such a rule, another can repeal it. And if another takes upon himself to disregard it, that amounts in effect to its repeal. And our Superior Courts have in this respect, all the powers of the English Court of Chancery.

Before Lord Thurlow's rule, the regular course was, to allow the answer, in a proper case, to be *amended*. The Court seems to have felt, that it had the power to allow amendments in any case; but still, that, in the exercise of the power, it ought to govern itself, by a sound discretion. 1 *Duk.* 33, *do.* 35; 1 *P. Wms.*, 300; 3 *Atk.*, 522; See 2 *Dav. Ch. Pr.* 339, and cases cited.

But if this were not so; if the power to allow an answer to be amended, did not belong to the Superior Court, as one of its original chancery powers, the power would yet belong to it, as a power conferred by the amendment Act of 1854, for that Act says, that plaintiffs or defendants, whether at law, or in equity, shall, as matter of right, be allowed to amend their pleadings, in all respects, whether in matter of form or matter of substance. *Amend* is the word used. The Act does not say anything about supplemental answers. *Acts of 1853-4*, 48.

It was further argued, that filing a supplemental answer, was a better mode of attaining the object, than was that of amending the answer. Be it so, and what of it, in the face

of a statute, which gives to the party the right to the mode of amending; and, in the face of a chancery rule, which gives to the Court, the power at discretion, to allow the mode of amending.

After all, the difference between the two modes, is, little or nothing. The effect of striking out a part of an answer, by amendment, is not to annihilate the stricken part. That still continues as much subject to be used as an *admission* of the defendant, if it is one, as it would have been, had it not been struck out, and there had been filed, a supplemental answer withdrawing or denying, the admission.

We think, then, that the Court was right, in allowing the amendment.

As to the order allowing the amendment of the minutes, we see no objection to that order. It now appears, that there was no necessity for the order; it now appears that the original order was itself, on the minutes. Ordering it entered *nunc pro tunc*, was, therefore, unnecessary; was doubtless the result of mistake or hurry. But if the original order had not been entered, no reason whatever is assigned, why the order *nunc pro tunc*, ought not to have been granted. The Court had the *power* to grant that order, and nothing is offered to show, that it ought not to have exercised the power.

Judgment affirmed.

JOHN DOE, ex dem., SAMUEL ADAMS, and others, plaintiffs
in error, vs. RICHARD ROE, casual ejector, and HUGH Mc-
DONALD, tenant in possession, defendants in error.

To authorize a plaintiff in ejectment to use the name of a third person, as lessor, he must show that he has a *bona fide*, subsisting claim to the premises.

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and that there is a connection between his title and that of the party, upon whose demise he seeks to recover; or that he has the authority of that person, in whom the paramount title is vested, to institute the suit, in his name.

Ejectment, in Hart Superior Court. Tried before the Honorable THOMAS W. THOMAS, presiding Judge, at July adjourned Term, 1859.

This was ejectment by John Doe, against Richard Roe, casual ejector, and Hugh McDonald, tenant in possession, for the recovery of a tract or parcel of land, situated in the county of Hart. The declaration contained five demises; the first from Samuel Adams; second, from William Dooly; third, from William W. Dooly, Mitchell N. Dooly, Barnabas J. Dooly, Van D. Garey and Lewis Stowers; fourth, from Barnabas J. Dooly; and fifth, from James E. Skelton, Littleton Skelton and John H. Skelton; the last named lessors being the real parties plaintiffs, and claiming the land in controversy.

Brief of evidence for plaintiff.

A grant from the State to Samuel Adams, dated 18th December, 1820. Next, a deed from Barnabas J. Dooly, to J. E. Skelton, John H. Skelton and Littleton Skelton, dated 5th December, 1856, for the premises in dispute. This deed was duly recorded.

Plaintiff then offered and read in evidence three receipts to Barnabas J. Dooly, one from Elizabeth Dooly, one from Lewis Stowers, and one from William W. Dooly, in full, respectively, of all their interest in the estate of William Dooly, deceased, and all dated 6th November, 1856.

F. B. Hodges sworn, testified: That as county surveyor, he surveyed the tract of land represented in the plat for James E. Skelton, John H. Skelton and Littleton Skelton; made the plat; made the survey partly in the Spring of 1857, and finished it in the fall of the same year, or Spring of 1858. Thinks the grant to Samuel Adams covers the land sued for:

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found four corners of the old survey, as set forth in the grant to Adams; found all the branches as laid down in Adams's grant correctly described in his plat; found marked trees on most of the lines; poplar station on the branch laid down right. The residence of Hugh McDonald was without the lines of said survey, but a portion of one of the fields in cultivation by him and his stables were within the survey, and he was in possession of the same at the time this suit was commenced.

Cross-Examined.—Found only four of the sixteen corners called for in the grant. One of the lines in the plat made by witness, is nearly half as long again as that called for by the grant, and at that point of the survey, there seems to be a mistake. Is not positive that the grant covers the land; is of opinion that the grant covers the land in dispute.

In Reply.—The tract of land is very irregular in shape; has more corners than usual; it is not unusual to find some mistakes in the courses and distances in a survey having the number of corners that this has, and in surveys as old as this; but more common in surveys that are older.

Thomas B. Adams testified: That he was a nephew of Samuel Adams; he was living last Spring; heard it through the family. He left this country some thirty years ago.

Here plaintiff closed.

Evidence for defendant.

A grant from the State to D. M. Johnson, dated 29th January, 1856.

W. C. Davis, surveyor, testified: That he surveyed the tract of land described in the grant to Johnson, and that he believed it covered the premises in controversy.

W. G. Delony, Esq.; J. Nash, Esq.; J. G. Justice, Esq.; P. E. Davant, Esq., and R. J. Millican, Esq., attorneys at law, all testified: That they were the attorneys for the Skelton's and had not been employed by any one else for the

prosecution of this case. That the Skelton's only were their clients.

James E. Skelton, attorney at law, testified: That he represented himself, and J. H. Skelton and L. Skelton, and no others. Did not know Samuel Adams; had heard of him; a few months ago he was living in Alabama. Was not authorized by him to bring this suit, but thought, in law, he had a right to use his name for the assertion of his own rights; had received several letters from him, but did not have them in his possession; had written a letter or two to Samuel Adams; John H. Skelton, Davant and Justice had written to Adams; that he, witness, and John H. and L. Skelton were parties for whose benefit this suit was brought, and the case was principally prepared by himself and John H. Skelton.

John H. Skelton, testified: That he was not authorized by Adams to bring this suit; did the most of the correspondence with Adams.

M. A. Johnson, testified: That he heard McDonald say, that he was holding the land under D. M. Johnson; that McDonald had been living on the land several years.

Here defendant closed.

The Skeltons then executed and filed in office a bond, with security, to save Samuel Adams harmless against all costs in this suit.

The Court charged the jury, substantially as follows:

The action of ejectment is usually brought in a form that is fictitious; this one is so brought. John Doe and Richard Roe, about whom you have heard so much in this case, are fictitious names; no such persons probably ever existed; the real parties in this suit are the lessors of the plaintiff, that is, the persons from whom John Doe says he obtained the premises by lease; these lessors are the real plaintiffs, and Hugh McDonald, tenant in possession, is the real defendant.

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It is familiar knowledge in this sort of action, that the plaintiff must recover by the strength of his own title, and not by the weakness of his adversary's. The defendant being in possession, that is sufficient title for him, unless plaintiff shows paramount title. A good and paramount title in law may be shown in some cases, by proving seven years or longer possession under certain circumstances, by the plaintiff or those under whom he claims, but it is needless to charge you the law governing such cases, because no possession has been shown in this case, either by any of the lessors of the plaintiff, who are the real plaintiffs, as I before stated, or by any one under whom they claim. The only question therefore, for you is, has a claim of title from the State down to any of the lessors of the plaintiff, been shown by the evidence; if such a title has been shown in any of the lessors, the plaintiff John Doe is entitled to recover on that demise. The Court then stated to the jury from the declaration, all the different demises laid, and told them that no evidence of a chain of title had been shown in any of the lessors except Samuel Adams, and after stating that they ought not to consider any of the demises, except that to Samuel Adams, proceeded as follows: Therefore, the sole question for your consideration, so far as the plaintiffs' case is concerned is, has a chain of title been shown in Samuel Adams. A grant to Samuel Adams has been introduced; now if this grant covers the land in dispute, and you so believe from the evidence, then a paramount title has been shown in Samuel Adams, because his grant is older than the one shown by the defendant, and seven years possession by the defendant or those under whom he claims, has not been shown, and the plaintiff is entitled to recover on that demise, if the defendant was in possession at the time of the commencement of the suit, unless there exists in the defence set up some legal objection to such recovery. Now if you believe the grant to Samuel Adams covers the land, and that Hugh McDonald was in possession at the commencement of the suit, your

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next inquiry will be, has the defendant any legal ground why the plaintiff ought not to recover on that demise. The defendant contends :

1st. That the demise was laid in the name of Samuel Adams without his consent or authority.

2d. There is no connection between the title of Samuel Adams and the title of the three Skeltons, whom the counsel Delony, Justice, Nash, Davant and Millican, state they represent, and in whose joint names one of the demises is laid.

3d. There is no *bona fide* title or pretense of title from Samuel Adams to said three joint lessors.

4th. That the evidence shows, that if a recovery is had under the demise to Samuel Adams, it will not enure and is not intended to enure to the benefit of said Samuel Adams.

I charge you, that if all four of these objections be true, according to the evidence, and you so believe them, then the plaintiff is not entitled to recover under the demise to Samuel Adams, notwithstanding the grant to him is the older, and covers the land in dispute; on the other hand, if the evidence fails to sustain either of them, the plaintiff is entitled to recover on that demise. With regard to the first objection, two of the lessors, James E. and John H. Skelton, state, that they considered themselves authorized to use the name of Samuel Adams, and that the only evidence of his consent or authority which they had, was certain letters, and the letters not being produced nor accounted for, I charge you, there is no evidence before you that Samuel Adams consented to, or authorized the use of his name as one of the lessors of the plaintiff. With regard to the second objection, I charge you that there is no evidence of any connection between the title of Samuel Adams and the title of the three joint lessors the Messrs. Skeltons, whom the counsel Delony, Justice, Nash, Davant and Millican, state they represent. With regard to the third objection, my charge is, there is no evidence of any claim or pretence of title, whether *bona fide* or otherwise,

from Samuel Adams to the three joint lessors, the Messrs. Skeltons. Therefore, you, with regard to these objections, ought to be confined to the fourth. Now, if it has been shown that a recovery will not enure to the benefit of Samuel Adams, and was not intended to enure to his benefit, you ought to find for defendant, notwithstanding the grant to Samuel Adams was the older, and covers the land in dispute. On the other hand, if you believe the recovery, if any, will be for the benefit of Samuel Adams, you ought to find for the plaintiff on that demise, if the grant to Samuel Adams covers the land.

The jury returned a verdict for the defendant with costs of suit.

And the plaintiff by his counsel on this, the 7th day of August, 1859, it being within thirty days from the adjournment of said Court, tenders this his bill of exceptions, and excepts to said decision :

1st. Because the Court erred in charging the jury that if all four of the objections insisted upon by the defendant were true, according to the evidence, and so believed by them, then the plaintiff is not entitled to recover under the demise of Samuel Adams, notwithstanding the grant to him is the older, and covers the land in dispute.

2d. Because the Court erred in charging the jury, that there was no evidence before them that Samuel Adams consented to or authorized the use of his name, as one of the lessors of the plaintiff.

3d. Because the Court erred in its charge to the jury, that there was no evidence of any claim or pretence of title, whether *bona fide* or otherwise, from Samuel Adams to the three joint lessors, the Messrs. Skeltons.

4th. Because the Court erred in charging the jury, that the enquiry with regard to these objections, ought to be confined entirely to the fourth. Now, if it has been shown that a recovery in this case will not enure to the benefit of Samuel

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Adams, and was not intended to enure to his benefit, you ought to find for the defendant, notwithstanding the grant to Samuel Adams is the older and covers the land in dispute.

5th. Because the Court erred in charging the jury that no evidence of a claim of title amounting to paramount title had been shown in any of the lessors except Samuel Adams, and that they ought not to consider any of the demises except that to Samuel Adams. And as the facts aforesaid do not appear of record, plaintiff by his counsel brings this his bill of exceptions, and prays that the same may be certified as required by the statute in such cases made and provided, in order that the errors complained of may be examined and corrected.

NASH; MILLICAN; and DELONEY, for plaintiffs in error.

HESTER & AKERMAN, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

This was an action of ejectment brought to recover a tract of land in Hart county. There were several demises in the declaration. I need mention two only. One is in the name of Samuel Adams, to whom the land was granted by the State in 1820. The other a joint demise from three of the Messrs. Skeltons; the defendant, McDonald, holds under D. M. Johnson, to whom the land was granted in 1856.

Both grants cover the premises in dispute.

It appeared on the trial, that this suit was brought at the instance and for the benefit of the Messrs. Skeltons, and that Samuel Adams had given no authority to use his name; and that a recovery, if had, would enure to the sole use of the Skeltons. The title of the Skeltons was a deed from one Dooly, of a recent date, but there was not a particle of proof connecting Dooly's title with that of Adams, the original grantee.

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Upon this testimony the Judge ruled, and we think very properly, that the only recovery that could be had in the case, was upon the demise of Adams, and that if the evidence showed, as it clearly did, that the action was not brought by him, and that the recovery would not enure to his benefit, that they ought to find for the defendant. The jury returned a verdict in accordance with these instructions.

The point decided in this case, has been several times before this Court. And we have uniformly held, that to authorize a plaintiff in ejectment, to use the name of another, he must show some connection between his title and that of the person in whose name he sues, *Couch vs. Turner et al.*, 17 Ga. Rep. 487; *Kinsey vs. Sensbough et al.* *ibid.* 540; that he is not invoking the paramount outstanding title to rob others, but to protect himself. Were it otherwise, there would be no end to litigation. Suppose you turn out McDonald, and put the Skeltons in possession under Adams's title, what is to prevent McDonald or Johnson or some one else, from bringing ejectment against the Skeltons, by a demise in the name of Adams, and eject them?

It is suggested by Mr. Millican, *arguendo*, that should a new trial be awarded, they expect to be able to establish a privity between the title of Adams and the Skeltons. A new trial is not needed for this purpose. From the fictitious character of the action, the suit can be recommenced and the proof made, if it exists and can be procured.

We are of the opinion that the judgment below should be affirmed.

Judgment affirmed.

Wood vs. Carter.

C. W. WOOD, plaintiff in error, vs. JESSE CARTER, defendant in error.

Pending an action with bail process in the Superior Court, the plaintiff took out an attachment, on the same demand, returnable to the Inferior Court.
Held, That he had the right to do so.

Certiorari, in Hall Superior Court. Decision by Judge HUTCHINS, September Term, 1859.

Carter instituted suit against Wood, in Hall Superior Court, in which bail was required and given. Pending suit, Carter sued out an attachment against him on the same cause of action, returnable to the *Inferior* Court of Hall county. Defendant Wood moved to dismiss the attachment, on two grounds:

1st. Because bail had been given in the common law action.

2d. Because the Superior Court alone had jurisdiction of the attachment, the same having issued pending the common law suit, and for the same cause of action. The Superior Court refused the motion and defendant brought the case, by certiorari, for review and reversal before the Superior Court.

The presiding Judge of that Court, (HUTCHINS,) dismissed the certiorari, and affirmed the judgment of the Inferior Court, and to this decision defendant excepts and assigns the same as error.

E. M. JOHNSON; and R. L. LAW, for plaintiff in error.

By the Court.—BENNING J. delivering the opinion.

Was either of the grounds of the motion to dismiss the attachment, good? We think not. We think that the twenty-eighth section of the Attachment Act of 1856, renders both of the grounds untenable.

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It was argued, that the old law was the same as this section of the new ; and, that, in *Clark vs. Tuggle*, (18 Ga: 604,) this Court had decided, that an attachment would by that law, not lie in such a case as the present, a case in which there was a bail writ pending when the attachment was issued. But that case was not like the present. In that case, the attachment and the bail process, were both issued at the same time. Not only so, but it was the attachment that was first served. Therefore, that was a case in which, it could not be said, that the attachment was issued *pendente lite*. If either of the two processes, was issued *pendente lite*, it was the bail process.

This being so, the Court in that case, thought, that the old Act, " which authorizes the issuing of attachments *pendente lite*," did not *apply* ; the Court thought, that the attachment was not " in the nature of an attachment *pendente lite*." This is the view which the Court acted on, in that case, whether this view is correct or not, (and I must say, that I now hardly think, that it is,) two things are certain ; one, that such a view is not possible in the present case, for in the present case, it is clear, that the attachment was an attachment, *pendente lite* ; the other, that the present question is on a new statute, the Attachment Act of 1856.

Consequently, we feel at liberty in any view of the case of *Clark vs. Tuggle*, to follow the plain words of the new Act, and hold, that an attachment may issue pending any suit, not excepting a suit, by bail process.

Judgment affirmed.

Smith vs. Hilly and wife.

LINDSAY H. SMITH, plaintiff in error, vs. THOMAS M. HILLY
AND WIFE, defendant in error.

Where a guardian makes annual returns of the condition of his ward's estate, he will be allowed all reasonable charges for the education and maintenance of the ward, although they may exceed the income. The single circumstance of the excess does not render them improper or unreasonable.

In Equity, in Elbert Superior Court. Tried before Judge THOMAS, at September Term, 1859.

This was a bill filed by Lindsay H. Smith, against Thomas M. Hilly, and wife, to recover certain sums paid and expended by him, as guardian of Mrs. Hilly, formerly Miss Smith, over and above his receipts as her guardian. The bill states, and the answer admits, that upon the marriage of his ward, he delivered to her husband, the said Thomas M. Hilly, all her estate, consisting exclusively of negroes. The bill further states, that said Thomas M., when he received said negroes, agreed to execute a refunding bond, and upon a settlement to be thereafter had, to allow and pay to complainant, whatever sum should be found due to him for excess of expenditures beyond his receipts. This statement the answer denies.

The bill further states, that complainant received as guardian \$805 48, and paid out and expended \$1,197 51, making an excess of expenditures of \$392 03; and further, that complainant paid out for counsel fees, costs, &c., not included in his returns, considerable sums.

The bill further states, that John A. Harper was the guardian of Mrs. Hilly, prior to complainant's appointment, and that he instituted suit against said Harper and recovered a judgment for over eight thousand dollars; but that Harper proved insolvent, and his sureties on his guardianship bond, defeated any recovery against them on account of the illegality of said bond, and that said judgment against Harper

was outstanding and unpaid at the time complainant delivered the negroes aforesaid to Hilly, but that since that time, Hilly has received from Harper a large amount on said judgment, and prays that defendants be decreed to pay to him the amounts above mentioned, paid by complainant, in excess of his receipts.

To this charge of the bill, defendants answered, that they had received from Harper only one hundred and fifty dollars, and that said payments made by complainant, being over and above the income and annual profits of his ward's estate, he was entitled to no repayment thereof.

On the trial, it was admitted by defendants that complainant had paid and become bound to pay the executions stated in exhibit B. filed with his bill.

After argument, the Court held and decided that complainant was not entitled to recover the entire balance that appeared in his favor, but could only recover the one hundred and fifty dollars, received from Harper with interest thereon, from the 15th October, 1855, that being the time defendant received it; and also fifty dollars with interest thereon, from 25th March 1846, being one-sixth of the counsel fees incurred and paid in the suit against said Harper; and also forty dollars, besides interest, being the amount paid out for the maintenance and education of his ward, prior to the verdict in favor of the securities of said Harper, and directed the jury to render their verdict accordingly.

The Court further held and decided, that the returns of complainant as guardian to the Court of Ordinary, were not sufficient notice to that Court, that the income of his ward's estate was insufficient for her maintenance and education; and that although the Court of Ordinary did not bind her out complainant was not justified in expending, for those purposes, any portion of her estate beyond the income, and that he could not recover the sums so paid and expended, the same exceeding said income.

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To which holding, direction and charge, complainant excepted, and assigns the same as error.

W. T. VANDUZER, for plaintiff in error.

HESTER & AKERMAN, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

In this case, the guardian has made annual returns, showing that for several years, the expenses of the maintenance and education of his ward have exceeded her income; and the only question is, whether this excess ought to be allowed him in his account. Our statute of 1799, see *Cobb's Dig.* 313, directs that guardians shall be allowed all "reasonable disbursements suitable to the circumstances of the orphan," and then declares that when it shall *appear* to the Court of Ordinary that the income is not sufficient for the education and maintenance of the orphan, it shall be the duty of the *Court* to bind out the orphan, in order to secure the education and maintenance in that way. The work of education and maintenance is to go on, whether the child be bound out or not. The guardian must go on with it till he is stopped by the Court. He must furnish to the Court information of the condition of the estate, as was done in this case, by his annual returns, and then proceed with the work of education and maintenance, taking care not to exceed "reasonable" limits in his outlays for this purpose, until the Court gives him notice that the work is to be done in another mode, that is by binding out the ward.

All of the charges in this case were admitted to be true and proper, unless they were rendered improper by the single fact, that they exceeded the income. We do not think this fact rendered them improper in this case, because the Court by leaving work in the hands of the guardian, afte

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notice of that fact from him, must be considered as having authorized him to disregard that fact. That his annual returns were sufficient notice of the fact, was expressly decided by this Court in the case of *Rolf vs. Rolf*, 20 *Ga. Rep.*, 325. We adhere to that decision.

Judgment reversed.

HENRY P. HARRIS, administrator, plaintiff in error, vs. WILLIAM A. SEALS AND WIFE, defendant in error.

The next of kin of an intestate, divided out his whole estate among themselves, according to the rule prescribed by the statute of distributions. Afterwards, an administrator was appointed. He failed to make any returns of any sort, to the Court of Ordinary. One of the heirs applied to that Court, to have him removed, for this failure.

Held, That if there was no debts, the division by the heirs, was a good administration of the whole estate, although such division was the act of executors *de son tort*; and therefore that there was no estate of the intestate left, about which, any return could be made; and, consequently, that the failure of the administrator, to make any return, was not a sufficient cause to authorize his removal.

Petition from Warren. Tried before Judge THOMAS, at October Term, 1859.

The facts of this case and the points adjudicated will be sufficiently understood, from the following opinion of the Court, together with the head note made out by the Judge delivering said opinion.

TOOMBS; and POTTLE, for plaintiff in error.

WASDEN & NELMS, *contra*.

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By the Court.—BENNING J. delivering the opinion.

The charge of the Court below, amounts as we think, to this; that if the administrator, Henry P. Harris, had made no returns of any sort, he ought to be removed from the administration, although it might be true, that at the time when he was appointed administrator, there were no debts against his intestate Nathan Harris, and the whole estate of the said Nathan, had been divided out, by his heirs among themselves, in the proportions prescribed by the statute of distributions.

If the heirs divided out the estate in this manner, they in doing so, became executors *de son tort*. And, in Coulter's case, it is laid down, "that all lawful acts which an executor *de son tort* doth, are good." 1 *Wms. ex'ors*, 145. And all acts that are acts which a regular administrator, if one existed, would be bound to do, are, we think, acts that are "lawful," when done by an executor *de son tort*. In the case in which there are no debts, the regular administrator, if there is one, is bound to divide out the estate, among the heirs or next of kin, according to the statute of distributions. Therefore, if in that case, an executor *de son tort*, divides out the estate, in that way, the act will be good, the division will stand. In a word, the act will amount to a valid administration of the estate in full. Consequently, should a regular administrator be afterwards appointed, there will be no estate for him to administer; nothing which he can get into his possession, because the heirs will have the right to insist on the title, they acquired by the division, as a bar to any suit for the assets, brought by him against them.

It follows, that if, in the present case, there were no debts of the intestate, Nathan Harris, the division made by the heirs, among themselves, was valid, and nothing was left for Henry P. Harris to administer; nothing was left which he could in any manner get into his hands, as assets; the estate was fully administered, as much so, as it would have been, had the division been made by a regular administrator.

Now, when the case is such as this, is the administrator bound to make any returns to the Court of Ordinary? If he is, the charge was probably right; if he is not, the charge was wrong.

The answer to this question depends on the import of our statutes, relating to administrator's returns. The latest of these, is the statute of 1810. (*Cobb*, 316.) It declares, that "It shall be the duty of all guardians, executors, and administrators, to render a full and correct account of the state and condition of all such estates as they may severally have in their possession, to the Inferior Court," "which account shall contain a statement on oath, of the transactions of the estate, to the last day of December preceding." According to this, the return must contain an account of the "*estate*." But if there is no estate, there can be no account of an estate; and, consequently, there can be no return containing any account of an estate. The case is one to which the statute does not extend.

What has been said of this statute, may in like manner be said of the statute of 1764, requiring a return to be made of the inventory and appraisement. There can be no inventory, no appraisement, where there is nothing to inventory, nothing to appraise. And if there can be no inventory, no appraisement, there can be no return of one.

These statutes, then, do not require the administrator to make any return, in the case in which, there is nothing to administer. Consequently, they did not require Henry P. Harris to make any return as the administrator of Nathan Harris's estate.

The proceeding for the removal of Henry P. Harris, was under the Act of 1821, (*Cobb*, 321,) which empowers the Court of Ordinary, to revoke an administration, in the case in which, the administrator "shall fail to make returns within the terms prescribed by law, particularly, where no inventory shall have been made and returned, in terms of the law."

The case in which the power to revoke, is given by this

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statute, is the case in which there is a failure to make returns in the terms prescribed by law, that is to say, in the terms of the two first mentioned statutes. But, as we have seen, the terms of those statutes do not prescribe, that any return shall be made in the case in which, there is no estate, and therefore, nothing about which a return can be made. A failure to make returns in that case, is, therefore not a failure to make returns in the terms prescribed by law. Consequently, such a failure, is not a failure as to which, the power to revoke given by this Act of 1821, applies.

We think then, that the charge was erroneous; we think, that if there were no debts, and the heirs divided out the whole estate among themselves, according to the rule prescribed by the statute of distribution, before Henry P. Harris was appointed administrator, he was not bound to make any return in respect to the estate, or in respect to his administration, unless specially required to do so, by the Ordinary; and, consequently, we think, that his failure to make any return, was not a sufficient cause to authorize a charge to the jury, that they ought to revoke the administration.

This covers all the questions in the case, but one—the question, whether the Court was right in allowing the witness, Castleberry, to testify as to what was the meaning of the receipt given by Seals to Mrs. Rhoda Harris.

This is a question which was argued, not at all on one side, and very little on the other; and as it is a question of considerable practical importance, and as we have to grant a new trial any way, we think it best not to decide it. It will not be improper, however, to say, that we incline to think, that the Court below decided the question right.

New trial granted.

Judge STEPHENS having been formerly of counsel in this case, did not preside.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH,
JANUARY TERM, 1860.

Present—JOSEPH H. LUMPKIN,
LINTON STEPHENS,
RICHARD F. LYON. } Judges.

ABNER SUTTON, plaintiff in error, vs. DUNCAN McLEOD, de-
fendant in error.

[1.] 51st Common Rule of Practice maintained.

[2.] To authorize the presumption that land granted by the State in 1795 had reverted, there must be proof that neither the grantee nor any one claiming under him, has been known or heard of for such a length of time as to warrant the conclusion that the land was abandoned, or that the heirs of the grantee had become extinct, or that it had been escheated on account of the alienage of the grantee, or for some other cause.

[3.] To defeat the plaintiff in ejectment, the defendant may show a paramount title outstanding in another, without connecting his possession with that title.

Ejectment, in Emanuel Superior Court. Tried before
Judge Holt, at September Term, 1859.

This was an action, under the form prescribed by the Act
of 1847, brought by Abner Sutton against Duncan McLeod,

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for the recovery of a tract of land situated in the county of Emanuel, containing five hundred and ninety acres. The defendant pleaded the general issue and the statute of limitations.

At the trial, on the appeal, plaintiff offered in evidence a copy grant (having accounted for the loss of the original) to John Kersey, and a deed from Kersey to plaintiff. He then offered in evidence a plat of the premises made by the county surveyor, which covered the premises in dispute, and which premises were covered by the grant to Kersey, and embraced in the deed from Kersey to plaintiff; proved that defendant was in possession at the commencement of the suit, and about fifteen acres had been fenced by defendant five years before. Here plaintiff closed.

Defendant offered in evidence two copy grants and plats to Isaac Perry, dated 28th November, 1795, covering the land in dispute, having first laid a foundation for their introduction as prescribed by 51st Rule of Court.

Defendant also made oath that he got his brother to search for the originals. Plaintiff objected to the introduction of said copies. The Court overruled the objection, and admitted the copies in evidence; to which ruling plaintiff excepted.

Defendant proved that his possession began eight or nine years before suit was commenced, but the witness refused to state or name the year; that this possession was on the Perry land, but not on that part in dispute; that the land in dispute had been known as the "Perry" land for twenty years.

Defendant then proved that he purchased the land in dispute at Sheriff's sale, together with a large body of land known as the "Perry" land, in the year 1847, under executions against Joseph Perry, and that the Sheriff executed to him two deeds for said land, each conveying five hundred acres.

Defendant then offered in evidence the deeds executed by the Sheriff, dated 3d August, 1847, as color of title.

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After the evidence was closed, plaintiff requested the Court to rule out the Sheriff's deeds, on the ground that there was no evidence of seven years' possession prior to suit brought. The Court refused to exclude said deeds, and plaintiff excepted.

Counsel for plaintiff then requested the Court to charge the jury as follows:

1st. That there being no evidence of possession for seven years, under the Sheriff's deed, they cannot consider those deeds in making up their verdict.

The Court refused so to instruct the jury, but charged them that the deeds were offered as color of title only, and they must find that the defendant had held adversely under them, seven years, before said deeds could be made available as title.

2d. That as to the grant to Isaac Perry, upon which defendant relies to show title out of the plaintiff, unless they find that there is some one claiming under said grant, and that there is a valid, subsisting, outstanding title in some one who claims under Perry, that the plaintiff cannot be defeated.

3d. That the grant to plaintiff is *prima facie* good, and can only be defeated by some one who claims under the older grant to Perry.

4th. That defendant not claiming under Perry, the grant to him is not available as a defence against defendant.

All of which the Court refused to charge, but in relation to the last request, charged that, if the jury found from the evidence that the grant to Kersey was for the same land which had been previously granted to Perry, it was void, unless the State had in some legal way resumed the title, which had passed out of it by the first grant; and that the resumption of title must be shown by the plaintiff, as defendant could not be called upon to prove a negative; that the State could not rightfully grant the same land twice.

5th. Counsel for plaintiff requested the Court to charge the jury, that though Perry's grant was issued in 1795, yet

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he may have died without heirs and the land escheated, or he might have abandoned it, and that it devolved upon defendant, who relied upon his title to protect him, to show either that he had sold the land, left heirs, or had not otherwise abandoned title, and that the land had not escheated.

This charge the Court refused, but charged, that it having been shown that the land was granted in 1795, to Isaac Perry, the State could not rightfully grant it again to Kersey, and his grant is void, and plaintiff claiming under him must show, in order to avail himself of Kersey's grant, that Perry's title had escheated or been abandoned.

The Court further charged the jury, that possession is the best evidence of title; that if they believe that defendant has been in possession of the land more than seven years, next preceding the commencement of this suit, under the deeds from the Sheriff, then plaintiff's right is barred—but this was a question of fact to be determined by the jury. That a defendant in ejectment might defeat a plaintiff, by showing title out of him in a third party. That if defendant had shown a grant to Isaac Perry, in 1795, then the title of the State had passed out of it and vested in Perry, and the younger grant, under which plaintiff claimed, was a nullity. To which charge and refusal to charge plaintiff excepted.

The jury found for the defendant.

Whereupon, plaintiff's counsel tendered his bill of exceptions, assigning as error the rulings, decisions, charges and refusals to charge aforesaid.

WM. B. GAULDEN, for plaintiff in error.

JOHN T. SREWMACE, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

[1.] The preliminary proof submitted to the Court, was sufficient, according to the 51st Common Law Rule of Practice, with which we are not disposed to interfere, to entitle the defendant to introduce the copy grants to Isaac Perry.

[2.] We see no error in the Court's refusing to charge, as asked by plaintiff's counsel, that the presumption was, that the title to the land in controversy had reverted to the State before the younger grant issued. There was no proof offered by the plaintiff to raise such a presumption, and the burden was upon him. For any thing that appeared to the contrary, Isaac Perry, the original grantee, may have been living in Emanuel county when this case was tried.

The old grants bear date in 1795. Had proof been made that the grantee had not been known in that section of the State, from that time down, or for a half century, or any other long series of years, nor his heirs at law or representatives, or any one claiming said land as his, the jury would have been justified in presuming that the land had reverted to the State before it was re-granted in 1845. For I hold, that every reasonable presumption should be made against these old land titles. The public peace, as well as justice to private rights which have intervened, demand the enforcement of this policy to the fullest extent.

We think the verdict of the jury, as originally rendered in this case, was sufficient. There was no impropriety, however, in directing it to be amended. In finding for the defendant the premises in dispute, they find that portion of the land covered by both the old and new grants.

We are of the opinion, however, that it was error in the Court to refer it to the jury to find that the defendant would be protected by his statutory title, provided he had held possession of the land seven years, under his Sheriff's deeds, when there was not a particle of proof to authorize such a verdict. On the contrary, the utmost limit to which the evidence went, was that he may have occupied the land six years before the action was brought. This then should not have been submitted to the jury as an open question, but they should have been instructed, as a matter of law, upon the

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facts proven and undisputed, that the defendant had wholly failed to sustain his statutory title.

[3.] It was insisted by the counsel for the plaintiff below, and plaintiff in error here, that for the defendant to defeat the plaintiff by showing a paramount, outstanding title, he must go further, and connect himself with that title—equitably at least, if not legally.

This doctrine, it is true, has been again and again applied by this Court, to plaintiffs in ejectment, who lay a demise, in the name of some grantee who is not participating in the litigation. But the rule has never been extended to defendants. The possession of the defendant is a protection against all who seek to disturb it, until the true owner comes to assert his right. To him the defendant is answerable for mesne profits. And it is enough for him to show that the party suing is not the true owner, but that the paramount title is outstanding in another. This principle is hoary with age. We bow to it reverently.

THOMAS JONES, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] In an accusation of murder, where the defence turns upon the grading of the homicide, the Judge can not withhold from the consideration of the jury, any of the grades put in issue either by the argument or the requested charges, but all of the grades so put in issue, ought to be submitted to the jury, along with proper instructions, as to what constitutes each grade.

[2.] In grading the homicide, the jury may consider the drunkenness of the accused, at the time of the killing, not to excuse, or mitigate, or extenuate his crime, but to assist them in deciding, when there was a provocation, whether the intention to kill, preceded the provocation, or was produced by it.

Murder, in Richmond Superior Court. Tried before Judge Holt, at May Term, 1859.

The plaintiff in error, Thomas Jones, was indicted for the murder of William Osborne. At the trial, the following testimony was submitted on the part of the State :

Owen Gilfoyle, sworn : Was employed by the Augusta and Savannah Railroad Company last Christmas ; saw the difficulty between defendant and deceased, whose name was William Osborne ; it took place in Kahr's bar-room which is opposite the Savannah depot, in the city of Augusta, county of Richmond, State of Georgia ; it was on the 25th of December, 1858, between ten and eleven o'clock in the morning. Went with William Osborne, the deceased, to the bar-room ; when we arrived there defendant and some one else, were making some noise behind the blinds. I was on the other side of the blinds, in the bar-room ; the first I saw of the defendant he came from behind the blinds with Barney Willis and some other man, whose name I do not know. As soon as defendant saw the deceased, he walked towards where deceased was, who was talking with George Carl, and said two or three times he could whip the deceased ; I did not hear Osborne make any reply. Then Jones drew what I think was a knife, and struck the deceased ; he drew it from some part of his clothes, as I did not see it in his hands before that time ; I call the knife a dirk knife ; after giving the stroke upon the shoulder, on the left side, Carl and Houston took hold of defendant ; when they did so, Osborne made a stroke at Jones ; can't say whether he struck him or not. Carl and Houston then put Jones out of the door ; there may have been some others that assisted them in doing so. A young man by the name of Criss, who staid with Kahr, then pushed the door to ; there was considerable noise outside for some two or three minutes ; Jones then came pushing to the door again ; the young man pushed the door against defendant ; after a little while Jones pushed the door

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in; he had the knife in his hand; Osborne was standing by the counter; defendant cut him again about five inches from the navel, on the left hand side; defendant backed then, and Barney Willis and some one else took hold of him. Osborne walked out of the door in the store part of the house, and some one asked him to go up stairs to see if he was hurt; saw no more; saw Willis and the other man throw defendant on the floor and take the knife out of his hand. I was standing some three or four yards from the parties when it occurred; could not see all things in the house, but saw all I testified to. Did not hear Osborne say any thing to Jones; he made the stroke at him which I testified to. Osborne was sober; saw Osborne afterwards up stairs on the bed; saw the wounds; he lived until three or four o'clock next morning. I sat up with him all that night; he died between three and four o'clock on the morning of the 26th. Saw the wound on the shoulder-blade; it did not look more than skin deep to me. The wound on the loin was a pretty large one, his intestines came out through it; don't know if they were cut; the doctor put them back.

Cross.—Mr. Jones looked to me as pretty tight; he didn't look very drunk; he seemed to be able to go where he desired; he staggered about considerably; was not much acquainted with him to know if he was devoid of sense or not, and could not say when he was very drunk. Could not swear he had a knife until he (Jones) came back the second time; I saw what I thought was a knife the first time; am sure I saw it the second time. If Osborne said any thing to defendant, I did not hear him.

Osborne was standing at the counter when defendant approached him; am certain that defendant struck the first blow. Defendant was out about two or three minutes after he was put out. Did not see any effort made to get Osborne out; did not hear Osborne say he would stay there. They got Jones down before they got his knife away; did not see him try to cut his friends; two persons had hold of him:

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he tried his best to keep the knife. Did not see Osborne take hold of Jones when he returned; he did not have hold of Jones when defendant cut him. Osborne and myself worked together, and had been acquainted a good while; went with the deceased there that morning. Osborne took two drinks that day; we were there about five minutes; could not tell what the fuss behind the screen was about. James Rooney sat up with the deceased a part of the night, and Andy Benny also sat up with him that night.

Direct.—George Houston went away from here; don't know when. Barney Willis, saw him on the day of the Mayor's election; have not seen him since. Last I heard of Houston he was in Macon.

, *Diderick Kahr*, sworn: Heard the evidence of Owen Gilfoyle; it was my brother's bar-room. I stayed there at that time, and saw the difficulty; it was on the 25th December last, about ten o'clock in the morning. I walked to my brother's bar-room, which was opposite the Waynesboro' ticket office; when I got there I saw some friends there, Myers and Jacob Sanchas, and some others. I stayed a little while. I saw Tom Jones, Barney Willis, William Day and some others come towards the bar-room; saw Tom Jones was very drunk; they came in and there was loud talking. Saw Sanchas and Mr. Coker standing before the bar at that time; Sanchas asked Tom Jones to take a drink with him; Jones declined. Barney Willis came in and said defendant should not drink any more, that he had enough, that if he got any more he would throw it out again. Jones, Willis and the others walked towards the store and sat down. Jones was talking loudly: did not notice what he said. I then saw Owen Gilfoyle and William Osborne come over; I met them in the front store, and when they came in I told them "Christmas gift." They went to the bar-room to get a drink or segar, I don't know which. I walked around, saw Jones and the others go to the door which leads to the store; saw Jones stop at once and say, as I supposed to Osborne, "I

can whip you." He then took out his knife; it appeared to me to be a dirk; drew it out with the case, went towards Osborne and made a lick at him with it; the case was on it at the time. It seemed to me that Osborne defended that lick; don't think that it hurt him at that time; saw that George Carl was between them; saw Osborne strike at Jones on the left side; am not certain whether he struck him; it seemed to me he struck him on the left side. Saw Carl push Jones back through the bar-room door into the store. I went towards Osborne and told him, Bill, go out of the side door leading into the entry, keep out of the fuss, don't have no fuss here. He gave me to understand he was not going out; he said, I think, that he did not want to have a fuss there. I turned round to the door which leads to the front store to shut the door; at the same time Jones had come back; I caught Jones between the door as I was shutting it. I let go the door and went round the counter; Jones went right up to Osborne. When I was around the counter I saw Osborne have hold of Jones pushing him back; he had one hand on the throat and the other on the arm of defendant. I saw Tom Jones stab at Osborne at the same time with what appeared the same dirk; saw him stab Osborne on the side, the place described by Mr. Gilfoyle. I then saw Willis and another person whom I did not know, take the knife away from defendant after parting them. Jones told me after they took the knife away from him, that he was a friend to Jake Clarkson, and that he had imposed on him, meaning, as I supposed, Osborne. I then saw Willis and the others take Tom Jones off. Saw Osborne's clothes cut, and blood coming through it; the cut was on the side. It seemed to me that Jones knew Osborne. A very short time had elapsed between the time that Jones was taken out and returned. Osborne was pushing defendant back when I saw them from behind the counter; I suppose it was to defend himself. Willis took Jones's knife away; they had to scuffle to take it

away; they seemed to have him on the floor to take the knife away.

Cross.—I tried to persuade Osborne to go out; he gave me to understand that he was not going out, but he said something else, but I was in such a hurry that I did not understand what he said. Jones' friends were trying to get him away; Jones was very drunk; he staggered about. Am acquainted with Jones; he seems when he is drunk to be out of his mind. I saw Tom Jones have a knife in his hand; was afraid he would cut me, I therefore left the door, knowing that he would do so when drunk. Did not notice whether his friends were cautious or not when they disarmed him. Barney Willis did say he was foolish, and he should drink no more; this was before Osborne came; the loud talking behind the blinds was the effort of Jones's friends to take him off; it was then they met Osborne and Gilfoyle. When I saw them from behind the counter, Osborne had advanced a short distance from the place where I saw him as I went behind the counter; he was pushing him when the lick was given. Osborne was the largest man, and weighed about 180 or 200 pounds, defendant about 125 pounds; think that lick was given to deceased in the loin, whilst he was pushing defendant some four or five feet; he had defendant by the throat and right arm. Defendant when sober, was upright and gentlemanly in his conduct. (When intoxicated on that occasion, were his acts such as if he knew what he was about? Objected to. Objection sustained.) Heard Jones talk; he talked loud; he said a heap of things which I did not notice. The impression made upon my mind from what he said was that he was too drunk to know what he was doing.

Direct.—When Jones came back, Osborne was standing in the bar-room, somewhere in front of the counter; he went right towards Osborne, and I went behind the counter. Osborne and deceased moved from the counter towards a little table; Osborne was pushing defendant back. Saw

Jones go up to Osborne; don't think Osborne walked up to meet defendant. Jones, when he came in the door, advanced to Osborne with his dirk.

Cross.—When I turned, after I passed around the counter, I saw defendant and deceased together. Osborne had pushed defendant back about three feet from where he stood when I went around the counter, and he pushed him some four or five feet afterwards; defendant was cutting at the deceased at the same time.

Robert H. Corker, sworn: On the morning of last Christmas, as I was sitting by the stove in that bar-room, Jones and others came in while I was sitting there; they came around and took a seat by the stove, and I got up; just as I was going out, Osborne came in; Osborne asked me to take a drink with him; I declined, and walked on to the front part of the store, near the door; I remained between three to five minutes, my attention was attracted to a noise in the bar, I turned and saw them putting Mr. Jones out of the bar. Saw Osborne standing at the bar about the same place where I had left him. The parties tried to close the doors upon Mr. Jones; Jones had a knife in his hand, a long, slim knife, it had the appearance of a dirk. They did not succeed in fastening the door, and he rushed back. I then stepped towards the bar-room door, and Osborne walked out into the front room. I stepped to the door and saw Willis and others have Jones upon the floor trying to take his knife away. I stepped to Osborne and told him he had best to leave; he said he could not leave, that he was cut; he pulled up his vest and showed me where the blood was coming through his clothes at his side. Saw Jones scuffling with knife in hand to come back; he made a remark to Mr. Kell, that he would cut him or any body else who would prevent him from coming back.

Cross.—Did not see them take the knife away; saw Barney Willis and others make the effort to take it away. There were two or three persons there I did not know; think

I saw Kell and defendant together several times ; don't know as to the extent of their friendship ; Kell was there taking care of defendant, and seemed to be acting as his friend that day.

The following evidence admitted by defendant's counsel :

The description of the wounds.

The death of William Osborne.

The wounds which caused his death were those described in the indictment, and that the death occurred at the time stated in the indictment.

State closed.

The defendant offered no evidence, and his counsel requested the presiding Judge to charge the jury :

1st. That mental alienation or unconsciousness from any cause whatever, at the time the deed was done, to the extent that the accused did not know what he was doing, will rebut any presumption of malice arising merely from the apparent recklessness of his conduct, so as to reduce the offence from murder to manslaughter ; the Court stating that he gave the instructions as asked, except as to the *furor brevis* of drunkenness or fit of drunkenness ; the Court further adding, in substance, that if a party be deprived of reason by the act of God, such as occurs in the case of lunacy or idiocy, or permanent insanity, then he is not responsible ; but this exemption does not apply when he voluntarily, and of his own accord, induces temporary mental alienation by intoxicating drink. Which charge, so requested, the Court failed and refused to give, to which failure and refusal, and to which addition and exception to the language of said charge, counsel for prisoner excepted.

2d. That the existence of malice is not presumable in this case, if on any rational theory consistent with all the evidence, the killing was either justifiable, excusable, or an act of manslaughter.

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The Court refused to give the charge as requested, adding, "the question of malice is left distinctly to the jury."

To which failure and refusal to charge in the language as requested, counsel for prisoner excepted.

3d. That the jury must find from the evidence that at the time of the killing, Jones was a person of sound memory and discretion, otherwise the defendant cannot be convicted of murder.

The Court stating that the instruction was given as asked, except the unsoundness or want of discretion arose from a *furor brevis*, or fit of drunkenness, as before stated.

To which failure and refusal to charge, as requested, counsel for prisoner excepted.

To each and all of which failures and refusals to charge as requested, and charges as given, counsel for prisoner excepted, and now excepts and assigns the same as error.

A verdict of guilty was rendered; whereupon, counsel for prisoner moved the Court for a new trial, on the following grounds:

1st. Because the Court erred in refusing to charge the jury, in the words following, as asked by prisoner's counsel, to-wit: "That mental alienation or unconsciousness from any cause whatever, at the time the deed was done, to the extent that the accused did not know what he was doing, will rebut any presumption of malice arising merely from the apparent recklessness of his conduct, so as to reduce the offence from murder to manslaughter. The Court stating that he gave the instructions as asked, except as to the *furor brevis* of drunkenness, or a fit of drunkenness. The Court further adding, in substance, that if a party be deprived of reason by the act of God, such as occurs in the case of lunacy or idiocy, or permanent insanity, then he is not responsible; but this exemption does not apply where he voluntarily and of his own accord induces temporary mental alienation by intoxicating drink."

2d. Because the Court erred in his ruling, and in refusing to

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charge the following words asked by defendant's counsel, to be given in charge to the jury: "The existence of malice is not presumable in this case, if on any rational theory, consistent with all the evidence, the killing was either justifiable, excusable, or an act of manslaughter." The Court refusing to give such charge, adding, "the question of malice is left distinctly to the jury."

3d. Because the Court erred in his ruling and charging upon the following instructions asked for by defendant's counsel, to-wit: That "the jury must find from the evidence that at the time of the killing, Jones was a person of sound memory and discretion, otherwise the defendant cannot be convicted of murder;" the Court stating that the instruction was given as asked, except the unsoundness or want of discretion arose from a *furor brevis*, or fit of drunkenness, as before stated.

4th. Because one of the jurors who sat upon the trial of the cause, and who rendered the verdict of guilty as above stated, to-wit, Charles W. Gruber, was not an impartial and unbiased juror, between the State and the defendant, for that said juror had before said trial, expressed very decided opinions against the defendant; that he knew him, and that defendant ought to be hung; which was wholly unknown to the defendant or his counsel at the time he was put upon the prisoner by the State, and until after said verdict was rendered. In support of which last mentioned ground for new trial the annexed affidavits were submitted, marked exhibits A, B, C, &c. The said juror, Charles W. Gruber, having been previously asked the questions prescribed by the statutes, had by his answers thereto rendered himself a competent juror.

The presiding Judge refused to grant a new trial. Whereupon, defendant excepted, and assigned said refusal as error.

ALEX. H. STEPHENS; and F. J. WALKER, for plaintiff in error.

Sol. Gen. ROGERS; and WILLIAM R. McLaws, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] This was an indictment for murder. The killing was admitted upon the trial, and the defence turned wholly upon the grading of the homicide. The Judge was asked by the defence to charge the jury, "that the existence of malice is not presumable in this case, if on any rational theory consistent with all the evidence, the killing was either justifiable or excusable, or an act of manslaughter." The equivalent of this proposition, in simple terms, is that the jury should not grade the killing as murder, if the evidence would justify them in grading it either as justifiable homicide or as manslaughter.

The charge thus stated becomes a truism in criminal law, and we think was improperly refused. The Judge says, that the grade of justifiable homicide was not presented as an issue by the argument. If this remark be an intimation that the issue was not properly presented, it is sufficient to reply, that it was as competent to present it by asking a charge, as by making a speech, and the very request under consideration does present the issue. The Judge refused to let that issue go to the jury, because in his opinion there was no evidence which could support it. His opinion that the evidence could not support the supposition of manslaughter, if he had happened to have that opinion, would have been equally potent to exclude *that* grade also from the consideration of the jury. His opinion, then, if such had been his opinion, that there was no evidence which could possibly justify or mitigate the killing, would have been sufficient foundation for a judgment of murder by the Court, without the intervention of a jury. The homicide being admitted, there were but three possible conclusions in the case: murder, manslaughter, or justifiable homicide; and the exclusion of any two of the three, would necessarily have been an

adoption of the third. The Judge held, that his opinion was competent to exclude one of the three conclusions of law; if so, his opinion, if he had happened to have that opinion, would have been equally competent to exclude two; and the exclusion of two, would have been the adoption of the third, and a settlement of the whole business by himself.

He had no use for a jury on the issue of justifiable homicide, because, in his opinion, there was no evidence which showed a justification; and if he had happened to be further of the opinion, that there was no evidence which showed a mitigation, he could not have had any use for a jury on the issue of manslaughter.

The remaining conclusion of murder, would have been as certain as that one remains after taking two from three; and he could have had no more use for a jury in arriving at it, than he would have had for a jury to assist him in deciding a motion for a nonsuit. Would *this* be allowing the jury to judge of the *law* and the fact? It would be to obliterate the line of demarkation between the province of the Judge and the province of the jury in criminal cases, and to unite them both in the person of the Judge. To judge of the law and the fact, in a criminal case, is to determine from the evidence what acts were done, and with what intentions, and then to decide what crime they constitute, or whether they constitute any crime at all. In this case the Judge allowed the jury to decide *what* crime, but refused to allow them to consider whether there might be *no* crime. They were entitled to decide *all* the law of the case, but they were precluded from deciding a very important part of it. In the case of *Holden vs. The State*, 5 Ga. Rep. p. 445, this Court, consisting at that time of its first three Judges, said: "In short, the Court in the full exercise of its own functions, must still obey the behest of the statute, and concede to the jury the exercise of *their* judgment on *all the law of the case*."

In an accusation of murder, where, as in this case, the defence turns upon the grading of the homicide, in order that

the jury may exercise their judgment on all the law of the case, all of the grades put in issue, either by the argument or the requested charges, ought to be submitted to their decision, along with proper instructions as to what constitutes each grade.

The Judge instructs, but the jury decides. Every person accused of crime is entitled to have the decision of a jury, upon any defence of law which he may choose to rest upon the facts in evidence. Courts may distrust juries, but the Legislature confided in them.

[2.] In grading this homicide, what instructions ought to have been given to the jury concerning the drunkenness of the accused? This Court, approving of the Judge's refusal to give the instructions asked by the defence, thinks that other important instructions not given, would have been appropriate to the facts in evidence. I shall point out what we think would have been the proper instructions, but shall first present those views of the general subject which lead my own mind to the conclusions at which the Court arrived.

One side in the argument affirms as a great principle, that no man, drunk or sober, should be punished for a crime which he did not have sufficient mind to perpetrate; and the other replies, with an equally important principle, that drunkenness is no excuse for crime. The two sides, each relying upon its chosen principle, have arrived at singularly conflicting conclusions. The truth is, that both these principles are correct, and constitute with the just deductions from them, but parts of an harmonious whole, sustained by law and sanctioned by reason.

The error which the side of the accused commits, lies in assuming too large a quantum of mind as the *minimum* which can furnish the necessary mental element in all crime—in erecting too high a standard of mental capacity. Different classes of crimes do involve different degrees of mind, and in all classes there may arise particular instances which, in the mode and circumstances of their perpetration, may in-

volve even a high degree of scientific knowledge. But subject to this qualification of the general truth, the general truth itself is, that the minimum of mind which can furnish the necessary mental element in crime, is a far smaller quantity than was claimed by the argument for the accused. The argument, rightfully assuming that there can be no murder without the mental element of malice, proceeded to claim, as being necessarily involved in malice, an amount of memory and reason which I think is not justified by the legal dimensions of that malice which enters into the constitution of murder. The popular idea of malice in its sense of revenge, hatred and ill will, has nothing to do with the subject. A number of cases might be given to show the difference between the popular idea, and that malice which forms a necessary part of the legal crime of murder.

The crime of infanticide presents the difference in a striking light. This crime is clear murder, and the mother who destroys her infant to conceal her own shame, has legal malice, though in point of fact she may feel no hatred towards any human being in the world, nor any indifference to human life in general, and may actually have the yearnings of a mother's love towards her innocent victim—loving its life just less than her own reputation. Here there is no malice, in the popular sense assumed in this argument, and yet the law says there is malice, and that the killing is murder; and reason gives its undoubting sanction to the law. The legal idea of malice in the crime of murder is, simply, an intent to kill a human being, in a case where the law would neither justify nor in any degree excuse the intention, if the killing should take place as intended. I make no distinction between malice express and malice implied in this definition, for there is no difference except in the mode of arriving at the fact. You may prove the particular intent, or you may prove the more general intent, which includes it and implies it, but the thing when once you get it, is the same in both cases, and is the simple intent to kill a human being,

in such a case as I have stated. Whether this intent springs from hatred or from a sense of shame, or from the mere phrensy of drunkenness, it is malice, it is the mental constituent of murder, unless there is something to justify the intent, or in some degree to excuse it. Now, the kind of a case in which this intent happens to be formed, obviously has nothing to do with the *quantum of mind* involved in its formation. Whoever then has mind enough to form the simple intention to kill a human being, has mind enough to have malice, and to furnish the mental constituents of murder. And even this quantum of mind, small as it is, is to be viewed and investigated in the light of an important rule of evidence applicable to all men alike, and founded on reason and necessity. It is, that all men are presumed to intend the natural and *proximate* consequences of their actions. When a man kills another by the use of means appropriate to that end, he is presumed, drunk or sober, to have *intended* that end.

This is but a presumption, but it must prevail until it is rebutted by other facts and circumstances, showing that the end was not intended, but was accidental; it cannot be rebutted by the mere vague opinions of witnesses that the man had "no mind," or "did n't seem to know what he was doing." The result is, then, that any man, sober or drunk, sane or insane, has *mind* enough to furnish the mental element in murder, when he has enough to form the intention to kill a human being; and he shall be presumed to have formed that intention, whenever he has done the act of killing by the use of appropriate means, unless there are circumstances to show that death was an accidental and not an intended consequence of his act. This doctrine faithfully enforced, offers no escape to the drunken man, from punishment for the crimes which he *commits*, and for those not committed by him, he ought not to be punished. Under this doctrine, if it were the whole law applicable to his case, even the poor idiot could

"scarcely be saved." But it is not the whole law applicable to his case.

And this brings me to a consideration of the great perversions which have been made of the doctrine that drunkenness is no excuse for crime. The foundation stone of these perversions, not distinctly shaped in the argument, but unconsciously assumed in it, is a feeling or notion that the exemption of insane persons and young children from criminal responsibility, is not the result of positive law excusing them, but is the simple consequence of their mental deficiency, which is supposed to be so complete as not to be capable of furnishing the mental element of crime; while the drunken man, with the same actual mental deficiency, is held responsible for his actions, not because they are crimes having the mental and physical element of crime, but by virtue of a certain *destructive* capacity infused into him, from reasons of policy, by the law which declares that drunkenness shall be no excuse for crime. The reverse of all this is the true philosophy of the law. The law deals with all of these classes of people, as having a sufficient quantum of mind to have bad passions, and evil intentions, and carelessness in their actions, and so to furnish the mental element of crime, but as laboring also under an infirmity of reason, which serves to betray them into these evil intentions and carelessness, and at the same time breaks down this power of resisting temptation. The law comes in then, and excuses the young and the insane, out of tenderness towards an infirmity which is involuntary, and at the same time, to guard against the possibility that men might make the same excuse whenever there is the same infirmity of reason, the law takes special care to exclude drunken men from the excuse, because their infirmity is voluntary.

The result is, that the young and the involuntary insane occupy a platform of their own, by virtue of an exception made in their favor, while the voluntary insanity of drunk-

enness being excluded from the exception, stands just as if no exception had been made, and the drunk man and sober man occupy the same great platform of responsibility for the crimes which they commit, and for no others. When their actions have the criminal mental element united with them, they become crimes—but not till then.

The crimes of drunk men, like those of sober men, are *actual* crimes, not constructive ones—*whole* crimes, not pieces of crimes. And drunkenness, like all other things which are not made excuses by positive law, is no excuse for crime, but is like all the rest, a *fact* which ought to be used whenever it can, as it often may do, to shed light upon either branch of the alleged crime, the physical or mental, in investigating what crime, or whether any crime has been committed. The argument might safely be left where it now stands, but I prefer to trace the fallacies which have been founded on a sound principle, through the two special forms in which they have presented themselves. One is this: Drunkenness is no excuse for crime, *therefore*, drunkenness can not be used for any purpose of defence in a criminal accusation. A *non sequitur*, if ever there was one. Ignorance of chemistry is no more an excuse for crime than drunkenness is; *therefore*, if the reasoning be good, ignorance of chemistry cannot be used for any purpose of defence in a criminal accusation. If Dr. Webster, on his celebrated trial at Boston, some years ago, for the murder of Dr. Parkman, could have shown that he was ignorant of chemistry, he could have shown conclusively, not that he had an excuse for the murder, but that he did not commit it; for the slayer, whoever he was, had carried the dead body through a process of destruction, involving high chemical knowledge. No doubt the Court would have allowed him to save his life by proving his ignorance of chemistry, although ignorance of chemistry was no excuse for crime. Suppose now, the Doctor could have proved that he had been drunk to the

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point of stupor or *mania potu*, during the time when that chemical process must have been performed. No doubt the Court would have allowed him to do so, not to excuse, mitigate, or extenuate his crime, but simply to show, in a very satisfactory way, that he had not committed the crime; for it is exceedingly improbable that a man in that degree of drunkenness, could have conducted the chemical process. And Dr. Webster would have been allowed to save his life by proving that he was drunk.

Some years ago, I knew an attempt at house-burning, where the slow match, found after the fire had been extinguished, exhibited great ingenuity in the bending of wires and crooking of pins in a peculiar way, so as to secure both slowness and certainty of ignition. The crooking of the pins especially, in a manner so peculiarly adapted to the end in view, was the theme of village wonder, for weeks afterwards, and is still remembered by many persons as a remarkable display of mechanical genius. Now there were two or three men who frequented that village in those days, any one of whom, if suspicion had fallen on him, could have proven, that at any time for a week before the fire, he had been too drunk to crook a pin. Would any man have discarded that evidence, if he had been seeking for the *truth*? Both these illustrations show the absurdity of excluding the consideration of drunkenness, in investigating the *act*, which enters into the alleged crime; but another form of the fallacy is, that when the act appears to have been done by the accused, he shall not be allowed to excuse his act by any consideration of his drunkenness. It might be sufficient to reply to this, by saying, the law says, that for *crimes*, not acts, drunkenness shall be no excuse. This form of the fallacy ignores utterly the most important element of the crime; for the mental part of the crime is criminal in morals and religion, without its union with any act whatever, while neither in law nor morals, has the act any criminality whatever, until connected with a criminal state of mind. *Acts* need no ex-

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cuse, *crimes* do. This form of the fallacy puts a drunk man, not on the same platform with sober men, but on a much more disadvantageous one. The act when done by appropriate means, carries a presumption against all men, sober or drunk, that it was intended to be done; but this proposition is to leave it but a presumption against *sober men*, and to fix it irrevocably as a conclusion against a drunk man. The proposition admits, that drunkenness, like any other, "no excuse" for crime, may be used to throw light on the investigation into the physical constituent of the crime, but denies that it may be used in examining into the *mind*, which is the special field where drunkenness displays its power. That is to say, it may be used in that part of the investigation, on which it ordinarily throws least light, but must be excluded from that branch on which it usually throws most light. Can there be a sensible reason for such a discrimination between the purposes for which drunkenness may be used? It is too apparent to need argument, that when the act is shown, the mental constituent of the crime still remains to be investigated, and in this investigation, there can be no rational discrimination made between the light which may be shed upon it by drunkenness, and that which may be shed by any other fact in the world. Let me illustrate this branch of the investigation. The fact of being a skillful physician is no more an excuse for crime than drunkenness is, and *therefore*, if the reasoning in the last form of the fallacy be good, the fact of being a skillful physician, ought not to be used for the purpose of showing with what intention an act was done. A man indicts another for an attempt to poison him, and proves that the accused actually administered arsenic to him. Here the act is done, and the sole question is as to the *intent* with which it was done. The accused simply shows that he was a skillful physician, and this single fact, in connection with the other fact, that the man did not die, but got well, explains the whole case, and shows that the act was done with an innocent and praise-

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worthy intention; for if a skillful physician should intend to kill by arsenic, he would infallibly regulate the dose to kill, and not to cure. And here the man is permitted to "excuse" his act in the language of the fallacy, by proving his own superior knowledge, a fact which of all others, is surely the *last* which ought to be allowed to excuse any crime. Is it not plain, that he does not use the fact, to "excuse his act," but simply to show that the act was an innocent one which needed no excuse? Shall not drunkenness be used for the same purpose when it can shed the same light?

A skillful marksman shoots at a bird, at a short distance, but misses the bird and kills a man, who was behind the bush, and who turns out to be one with whom the marksman had a deadly feud. He is indicted for murder. The fact, that a man so skillful with his gun should have missed the bird at so short a distance, and should have hit his enemy, makes a strong impression, that the shooting at the bird, was but a pretence to cover the real intention to slay his enemy. But the man shows that he was *very drunk*, a fact which renders it at once very probable that he should have missed the bird, and very improbable that he had sufficient capacity for so deep an artifice, as the one imputed to him, for drunk men are much more apt to be the victims, than the perpetrators of tricks. Is there in the world, an enlightened christian, or a barbarian, who will say that this man ought not to be allowed to save his life by proving that he was drunk? The fact has no effect to excuse his crime, nor to excuse his act, but to show that his act, though an unfortunate one, was innocent and needed no excuse; or else, to show that it was not an act of *murder*, but an act of involuntary manslaughter, in the pursuit of a lawful intent without due caution and circumspection. On the question of *murder*, his drunkenness is in his favor, but on the question *of* carelessness, in the pursuit of his lawful intent, it is against him; for carelessness is much more easily believed of a drunken man than of a sober man. His drunkenness saves

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him from the one charge, and convicts him perhaps of the other, not by excusing the one crime, nor aggravating the other, but simply by shedding the light of *truth* upon both. Apply these principles to the case before us. Osborne with one hand seizes Jones by the arm, and with the other by the throat, and pushes him back. Jones stabs Osborne and kills him. Jones is indicted for murder. His defence is that the killing was but the repelling of an assault and battery, which reduces it to manslaughter at all events, and will also reduce it to justifiable homicide, if the jury should think he had reasonable fear, that Osborne would choke him to death. The State replies, that though such an assault and battery occurred, the killing was not produced by it, and was but the execution of an intent formed and in process of execution, *before* the assault and battery occurred. Right here, hangs the case, the defence maintaining that the intent to kill was produced by the provocation, and the State maintaining that it existed before. What is the evidence to support the view of the State? Jones was walking up to Osborne with a knife in his hand, and he was very drunk. Here his drunkenness is against him, for it is easier to believe that a reckless drunk man intends to kill without provocation, than that a thoughtful sober man has such an intention. This is the whole case made by the circumstances of the fatal rencontre, to show that Jones had an intent to kill *before* he received the provocation. But the State wisely chose, not to rest the case there, and the strongest evidence on the point, is light reflected from a *previous* rencontre, in which Jones had much more clearly manifested the intent to kill. The argument was, that *having had the intention in the first rencontre, he must be presumed to have persisted and continued in the same state of mind, up to the second rencontre, a very short time afterwards. The interval between the two rencontres, is not definitely stated, but it was sufficiently long for Jones to be put out of the house and come back again, and be the interval long or short, the whole*

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force of the argument lies in his presumed persistence and continuance in the *same state of mind*, from the first rencontre to the second. And right there his deep drunkenness was evidence in his favor, tending to rebut the presumption of such a persistence or continuance in the same state of mind. Who needs to be told that drunkenness may almost destroy memory for the time, making it as a mere *seize*, letting events and thoughts, and intentions slip through it as soon as they fall into it? He might have *forgotten* the first rencontre, and all its passions and intentions, and so have brought none of them to the second—if he was *very* drunk. But drunkenness, far short of the point of extreme forgetfulness, renders the mind inconstant in purpose, and exceedingly whimsical and rapid in its changes from one emotion to another, and even from one class of emotions to another class.

Who has not seen the drunken man, breathing threats one moment, and the next, uttering maudlin professions of friendship—in one moment an imaginary hero, in the next, an abject whimperer?

The whole tendency of drunkenness, was to *change* that state of mind—which the State maintained had *not* been changed, but had *continued* from the first rencontre to the second. Its tendency was to rebut the strongest evidence, which showed the formation of an intent to kill, before the provocation was given. And it is exactly for this purpose, that the drunkenness, in the opinion of this Court, ought to have been considered by the jury, to assist them in deciding, whether the intent to kill preceded the provocation, or was produced by it.

Judgment reversed.

LYON J. dissenting.

Swan vs. The State.

SAMUEL SWAN, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

The penalties imposed by the Act of 23d December, 1633, "to prevent the drawing of lotteries, or sale of lottery tickets in this State, for a violation of its provisions, cannot be enforced by indictment.

Indictment, in Richmond Superior Court. Tried before
Judge HOLT, April Term, 1859.

This was an indictment, founded on a presentment of the grand jury, for a violation of the laws of Georgia, in relation to lotteries.

Upon the call of the case for trial, defendant Swan moved to quash the indictment, upon the following grounds:

1st. Because the offence charged in the indictment, is not indictable by the laws of the State.

2d. Because the offence charged, if indictable at all, could not be prosecuted criminally by indictment founded on presentment, and without a prosecutor.

3d. Because the indictment did not set forth a crime known to the laws of this State.

4th. Because the indictment could not be supported under the Act of 1833, without a prosecutor.

The Court overruled the motion to quash upon all the grounds, and the defendant excepted.

In the progress of the trial, the defendant offered in evidence, assignments of the Sparta Academy Lottery, from the trustees of the Sparta Academy, to F. C. Barber, and from Barber to the defendant, the execution of said assignments having been first duly proven or admitted. The Court rejected the evidence, and the defendant excepted.

The defendant then offered in evidence the receipt of J. B. Trippe, Treasurer, and Peterson Thweatt, Comptroller General of the State of Georgia, for the payment of one thousand dollars as taxes to the State, under the Act of 11th

December, 1858, and also offered to prove that said sum of money was thus paid under a demand from the Governor of Georgia, and under a threat, to enforce the penalty of said Act, unless it should be so paid. The Court rejected the receipt and the proof offered, and the defendant excepted.

The Court, in charging the jury, read to them the Act of 1833, concerning lotteries, *down to the proviso*, and stated that it was the law of the case, and not his opinion; omitting to read, at the same time, the proviso to the same Act, contained in the fourth section thereof, upon which the defendant had mainly rested his case. To this charge as given, and the omission to read said proviso, the defendant excepted.

The Court was requested in writing by defendant, to charge the jury, as set forth in the motion for a new trial, which requests to charge were refused or qualified as therein stated, to all which refusals to charge and qualifications of the charges requested, the defendant excepted.

The jury rendered a verdict of guilty. Whereupon, the defendant moved the Court for a new trial, upon the following grounds:

1st. Because the defendant requested the Court to charge, "that the Act of 1826, conferring upon the trustees of the Sparta Academy, and their successors, the right to raise five thousand dollars by lottery, having been passed before the Act of 1833, is excluded from its operation, and that, therefore, all drawings of a lottery, under and by virtue of that Act, are excluded from its operation; and that no person, acting by authority from the trustees of the Sparta Academy, or their successors, in such drawing, can be found guilty of any crime under the laws of this State." Which charge was given, but with the qualification, "if the drawing conformed to the Act."

2d. Because the Court refused to charge as requested by defendant, "that it is not competent in this case to show whether or not other commissioners than those named in

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said Act, (not being the defendant now on his trial,) superintended that lottery, nor does that fact in any wise affect the guilt or innocence of defendant."

3d. Because the Court refused to charge as requested by defendant, "that whether or not the parties, entitled by the Act of 1826, to draw said lottery, exercised that right in a manner different from that specified in the grant, is not a fact inquirable into in this case, and can in no wise affect the guilt or innocence of the defendant."

4th. Because the Court refused to charge as requested by defendant, "that if the defendant, in the opinion of the jury, acted *bona fide* and with an honest belief that he had a legal title to the franchise, and was legally authorized to use it, and did use it under color of right, by purchase, for the benefit of the Sparta Academy, the jury cannot convict him," and in lieu thereof, charged, "that intention is necessary to constitute crime, but that is to be inferred from action; that when men deliberately do a forbidden act, it is to be inferred that they intended to do it, and that a mistake in matter of law, as to its criminality, is no excuse for it."

5th. Because the Court refused to charge as requested by defendant, "that the Act of the 11th December, 1858, repealed and released all penalties or crimes against each manager of any lottery, authorized by the laws of this State, except the payment of a tax of one thousand dollars annually to the State Treasury, and repealed all previous penal laws, if any such existed against such manager."

6th. Because the Court erred in holding that the offence charged in the indictment is indictable by the laws of the State.

7th. Because the Court erred in holding that such offence, if indictable at all, could be prosecuted criminally by indictment founded on presentment, and without a prosecutor.

8th. Because the Court erred in holding that the indictment set forth a crime, known to the laws of this State.

9th. Because the Court erred in holding that the indict-

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ment could be supported under the Act of 1833, without a prosecutor.

10th. Because the Court erred in reading to the jury, the Act of 1833, concerning lotteries, down to the proviso, and stating that it was the law of the case, and not his opinion, omitting to read at the same time, the proviso of the same Act, contained in the fourth section thereof, upon which the defendant had mainly rested his case.

11th. Because the Court erred in rejecting the assignments of the Sparta Academy Lottery, from the trustees of the Sparta Academy to F. C. Barber, and from Barber to the defendant.

12th. Because the Court erred in rejecting the receipt of J. B. Trippe, Treasurer, and Peterson Thweatt, Comptroller General of the State of Georgia, for the payment of \$1,000 dollars as taxes to the State, under the Act of the 11th December, 1858; and also in refusing to admit evidence that it was so paid under a demand from the Governor of Georgia, and under a threat to enforce the penalty of said Act, unless it should be so paid.

13th. Because the verdict was contrary to law.

14th. Because the verdict was contrary to the evidence.

The presiding Judge refused the motion for a new trial, and defendant excepted.

MILLERS & JACKSON; A. H. STEPHENS; ROBERT TOOMBS; O. A. LOCHRANE; J. C. & C. SNEAD; and E. J. WALKER, for plaintiff in error.

W. R. McLaws; and, Attorney General ROGERS, *contra*.

By the Court.—LYON J. delivering the opinion.

The plaintiff in error, Samuel Swan, was tried and convicted, in the Superior Court of Richmond county, on a bill of indictment, preferred against him on a special present-

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ment of the grand jury, on the charge of being "concerned in the managing, conducting, carrying on, and drawing of a certain lottery, called the Sparta Academy Lottery, in the city of Augusta, said county and State; said lottery not being authorized by the General Assembly of the State of Georgia; and said lottery not being the Sparta Academy Lottery, authorized by the General Assembly of the State of Georgia, prior to the passage of the Act of said Assembly, passed the 23d day of December, 1833."

When the case was called, the plaintiff in error, by counsel, demurred to the bill of indictment, and moved the Court that it be quashed on three several grounds; all of which, may be considered in one, that is, that the bill of indictment contained no charge or offence that was indictable by the laws of Georgia. The Court refused the motion, and that is the first question for our consideration.

This proceeding originated under the Act of 23d December, 1833, "to prevent the drawing of lotteries, or sale of lottery tickets in this State," of which the following is a copy:

"Section I. From and immediately after the first day of May next, all and every lottery and lotteries, and device and devices in the nature of lotteries, shall be utterly and entirely abolished, and are hereby declared thenceforth unauthorized and unlawful.

Section II. From and after the day aforesaid, any person who shall sell, or expose to sale, or cause to be sold or exposed to sale, or shall keep on hand for the purpose of sale, or shall advertise or cause to be advertised for sale, or shall aid, or assist, or be in any wise concerned in the sale or exposure to sale of any lottery ticket or tickets, or any share or part of any lottery ticket, in any lottery or device in the nature of a lottery, within this State or elsewhere; and any person or persons who shall advertise, or cause to be advertised, the drawing of any scheme in any lottery, or be in any way concerned in the managing, conducting, carrying on, or drawing of any lottery, or device, in the nature of a lotte-

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ry, or be an agent in procuring or supplying lottery tickets, and shall be convicted thereof, in any Court of competent jurisdiction, shall for each and every such offence, forfeit, and pay a sum not less than five hundred dollars, and not exceeding one thousand dollars, at the discretion of the Court, one-half to be paid to the prosecutor, and the other to be paid over to the county treasurer, for the use of the county where the offence may have been committed.

Section III. In all cases where the party shall be convicted as aforesaid, and shall fail or refuse to comply with the provisions in the second section of this Act, he, she, or they, shall be sentenced to undergo an imprisonment in the common jail of the county, not exceeding six months, at the discretion of the Court.

Section IV. All laws and parts of law, militating against this Act, are hereby repealed: Provided, that this Act shall not apply to any lottery heretofore authorized by the General Assembly."

As this Act is not incorporated in the penal code, and as there are no express words in the Act itself, making a violation of its provisions indictable as a crime, we are forced to a construction of the statute to get the sense of the Legislature, as to the manner in which the penalties of the Act, for a violation of its provisions, are to be enforced; and, if, according to those rules of construction for the interpretation of the intention of the Legislature in similar statutes, that Courts have heretofore adopted, and followed, it is not clearly manifest that the Legislature, in passing this Act, intended to make a breach of its provisions indictable as a crime, then we cannot hold that it is so.

To ascertain the intention of the Legislature, after examining the words of the Act itself, it is necessary to take into view every fact and circumstance that influenced its passage. We must consider what the law was before; the mischiefs against which the law did not provide; the nature of the remedy proposed; the true reason of the remedy.

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The law on this subject, in existence previous to the passage of this Act, was the Colonial Act of 29th Feb., 1764, which enacts, "1st. That from and after the passage of this Act, if any person or persons shall erect, set up, &c., to be played, drawn, &c., any lottery, &c., or shall make, print, advertise, or publish, &c., proposals or schemes, &c., or shall deliver out, &c., tickets to the persons advancing, &c., or shall expose to sale any houses, &c., by any game, method, &c., depending upon, or to be determined by any lot, &c., or shall be adventurers in, or pay any moneys or other consideration, or any ways contribute unto any of the said games, lotteries and sales, such person or persons, and every or either of them, *on being convicted thereof*, on the oath or oaths of one or more credible witness or witnesses, or on the confession of the party or parties, accused, shall forfeit and lose the sum of five hundred pounds, lawful money of this province, to be recovered by action of debt, or information in the general Court of Pleas, the one moiety of such forfeiture to be to his Majesty for the support of this province, and the other moiety to the informer: And in case of any offender against this Act, not having sufficient goods and chattels whereon to levy the penalty hereby inflicted, or not immediately paying the said penalty, or giving security for payment thereof, *it shall* and may be lawful for the Justices before whom such person or persons shall be convicted, to commit him or them to prison, there to continue and remain for any time not exceeding twelve months."

This Act, and that of 1833, having reference to the same subject matter, must be construed together; in fact, taken together they form but one law. The Act of 1764, *not having* been repealed in express terms, all of its provisions *not in* conflict with those of 1833, or the subsequent Act of 11th December, 1858, are still in force. Upon an examination of the Act of 1764, it will be seen that its penalties were directed against—1st. The persons who establish or set up a lottery: 2d. Persons who advertise or publish proposals or

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schemes of lotteries: 3d. Persons selling or distributing tickets for chances in such lotteries: 4th. Those who expose to sale any property by lottery: 5th. Persons who bought chances in, or in any way contributed to the lotteries. As sweeping and comprehensive as were these enactments, the Legislature did not think them sufficiently so, and by the Act of 23d December, 1833, extended its provisions, so as to embrace all persons who should "be in any way concerned in the managing, conducting, carrying on, or drawing of any lottery, or device in the nature of any lottery;" the clause under which defendant is indicted. Here was one object that the Legislature accomplished by the new law.

By the Law of 1764, the penalty imposed was five hundred pounds; one half to the informer, and the other to the State Treasury. The Act of 1833, reduced the penalty to a sum not less than \$500, nor more than \$1,000, in the discretion of the Court; one half to the informer, and the other to be paid into the county treasury.

Under the Act of 1764, the conviction of the offender, and recovery of the penalty, could only be had in the general Court of Pleas; by the Act of 1833, the conviction and recovery, could be had "*in any Court* of competent jurisdiction in this State."

Upon a conviction, for a violation of the provisions of the Act of 1764, in case the offender did not have sufficient goods to levy the penalty, and he would not give security for its payment, the Justices before whom the conviction was had, might imprison him not exceeding twelve months. The Act of 1833, required the Court to imprison the offender, upon his failure or refusal to pay the sentence of the Court, for any time not exceeding six months; thus negating the idea, that the penalty might be collected by execution, or, that the defendant might give security for the payment of the judgment of the Court. These were important and beneficial changes, but all that the Legislature did make, leaving

the law to stand, with these exceptions, as it did before. Nothing whatever is said in the Act of 1833, of the form of conviction, except that it may be had "in any Court of competent jurisdiction." The Act of 1764, declares that the recovery shall be "by action of debt or information;" and this provision is not repealed. Take the two Acts together, (and we must do so, for they form one law, and but one on this subject,) and while the offence is distinctly created by the law, the particular method of proceeding, is as distinctly pointed out, and prescribed by the statute.

Now, did the Legislature intend, that the penalties imposed by the Act of 1833, should be enforced in the forms of proceeding prescribed by the Act of 1764? We think that it did, and for the following reasons:

1st. After this careful analysis of the Act of 1833, by the prescribed rules, we see various defects of the old law, that the Legislature intended to, and did, remedy by that Act, and the reasons why it did so; at the same time, we see no change whatever in the form of proceeding for the enforcement of the penalty, except in authorizing the proceedings to be had in any Court of competent jurisdiction, instead of the general Court of Pleas; that Court had ceased to exist; and that is the reason of this change. Hence, we conclude that this was all that the Legislature did intend to do by the Act of 1833; and that the penalties, of the Act of 1833, should be enforced as they had been theretofore required by the law to be done. We certainly see no intention on the part of the Legislature to substitute a criminal for a civil proceeding.

2d. As in the Act of 1764, one half the penalty imposed by that of 1833, goes to the informer; from which it is fair to infer, in the absence of any express words, that the Legislature expected, or intended that all action in the Courts on this subject would be instituted and prosecuted by some third person, by action of debt or *qui tam* proceeding, as in the former Act; and although, this is not sufficient of itself

to satisfy us, still it is a circumstance to show the inclination, at least, of the Legislature in passing the Act.

3d. The perfect silence of the Act of 1833, as to the form of proceeding, in which its penalties were to be enforced. Now, why was this? It is not sufficient to say, that it was an oversight or omission; the Act of 1833, is too well considered, and carefully penned in all its parts, to admit of any such supposition. But, if the Legislature supposed that the form of proceeding pointed out by the Act of 1764, was the proper one, and intended that it should be the remedy, then, that silence is accounted for.

4th. The Act of 1833, prescribes, that the conviction may be had "in any Court of competent jurisdiction." If a proceeding by indictment was intended, this expression was inaccurate, for an indictment could be had in only one Court, the Superior Court, and we must give every word its full and appropriate meaning, and nothing else; but, if the Legislature intended that the penalty should be enforced by an action of debt, or *qui tam*, then, the expression was full and appropriate; for that form of proceeding could be pursued in the Inferior as well as the Superior Court. This is a strong circumstance to show the intention of the Legislature.

5th. If the Legislature intended to make a violation of the provisions of this Act a crime, punishable by indictment, it is more than likely, that it would have been incorporated in and made part of the penal code, especially as the two Acts were passed during the same session, and assented to on the same day; and especially as that Act is entitled, "An Act to reform, amend and consolidate the penal laws of Georgia."

6th. The Legislature, on the 11th December, 1858, passed another Act, on this subject, as follows: "That every agent or other person selling lottery tickets, or other tickets of chance, not authorized by the laws of this State, shall be fined one hundred dollars for each offence, to be sued and

recovered in the Superior Courts of this State, in the county where the agent may reside, or in case of non-residence, where the tickets aforesaid may be sold; one-half to the informer, the other to the funds of the county where sued." Now, as this statute specifically prescribes the mode of enforcing the penalty, and the Act of 1764 does the same, while that of 1833 is silent as to the mode, and that part of the statute is now, and was in force at the passage of the latter Act, does it not follow, that the Legislature must have intended that the penalties of the Act of 1833, are to, or may be enforced by the mode pointed out. And, just here, it is as well to remark, that this statute answers nearly every argument drawn from the words of the Act of 1833, such as "convicted," "conviction," and "offence," "sentence," to show that the Legislature intended to make an indictable offence; for all these words, (except that of "convicted;" and that has always been used to express the result of the action of a Court as well in civil as in criminal cases,) are employed in this Act; and we will show before we conclude, that an indictment would not lie under that Act, or any of a similar character.

But it is objected, that this remedy is ineffectual, or cannot be enforced by action of debt, or a *qui tam* proceeding, because the penalty is discretionary with the Court. We see no difficulty in this, for if the jury find against defendant, their verdict can not be less than \$500, and it may be \$1,000, and if it be left with them, they would in this, as in all other questions of law, be under the direction of the Court. But we do not see why the jury should be embarrassed with the amount of the finding; their only verdict under this statute must be, for or against the defendant; that involves the whole issue. If it be against the defendant, then the Court, guided by the statutes, declares the amount defendant shall pay.

It is said again, that as imprisonment is the only means of enforcing the judgment of the Court, in which an informer

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could have no interest, that it follows that the Legislature intended a criminal proceeding. To this, we reply, that the imprisonment prescribed is not for violating the Act, but for failing to pay the penalty. Then, the question arises, conceding that a different remedy is pointed out in the law, by which the penalties may be enforced: will an indictment lie for a violation of its provision, there being nothing in the Act, either authorizing or prohibiting it?

This offence not being prohibited by the common law; and not embodied in the penal code, but one created by a statute, that points out a particular manner of proceeding against the offender, as an action of debt or information, without mentioning an indictment, it is settled that an indictment is not maintainable, because the mentioning the other methods of proceeding only, seem impliedly to exclude that of indictment. 2 *Haw. P. C.*, ch. 25, sec. 4. In *Rex. vs. Mead*, 1 *Burr*, 542, Lord Mansfield said: "In newly created offences, when there is a prohibitory, particular clause, specifying only particular remedies, then such particular remedy must be pursued. For otherwise, the defendant would be liable to a double prosecution; one upon the general prohibition, and the other upon the particular specific remedy."

But, aside from this direct authority, as we are to construe penal statutes, or such as work a forfeiture strictly; and as they are to reach no further in meaning than their words; and as too, all doubts concerning their interpretation are to preponderate in favor of the accused; how could we hold, that under this Act the defendant could be arraigned, tried, convicted and punished as a criminal, when there is absolutely nothing in the statute to warrant us in the belief, that the Legislature intended to impose on the offender any such infliction. If the Legislature intended that an offender against this enactment should be indicted under a criminal proceeding, it was easy to have said so, and as they have not said so, that is a sufficient answer to this proceeding.

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We think, therefore, that the Court ought to have sustained the motion to quash, and as this completely disposes of this case, we have not deemed it necessary to look into the other questions made by the record.

Judgment reversed.

HENRY C. LANG, plaintiff in error, vs. THOMAS E. BROWN,
defendant in error.

- [1.] It is unnecessary to make one, or the representatives of such an one, a party to a bill, whose name appears in a bond or agreement, as payee or obligee, when such an one had no real or actual interest in the transaction, nor could take any benefit under it, especially when it appears that the name was inserted therein, solely for the benefit of a third person named in the bond or agreement.
- [2.] H. C. L. held the titles to the one-half of a tract of land that T. E. B. had bought and paid for, to secure himself against loss, on account of T. E. B.'s half of the expenses that might be incurred in the erection of a mill on said land that they were building in partnership. On a bill filed by T. E. B., to compel a conveyance to him, from H. C. L., of his part of the land, alleging that his share of the expenses had been fully paid to H. C. L., it was no error in the Court to charge the jury, on the trial, "that even if they found that complainant had not paid the defendant one-half the expenses of erecting the mill on the premises, they might still decree against the defendant, a specific performance of the contract, to convey a moiety of the land and improvements to complainant; at the same time requiring complainant to pay one-half the said expense, or so much thereof as they might find unpaid and due the defendant;" but such charge submitted the question on which they were to pass, on its merits fairly to the jury.
- [3.] A new trial will not be granted when the verdict is sustained by the evidence, and no injustice done.

In Equity, in Washington Superior Court. Tried before Judge HOLT, at September Term, 1859.

This was a bill in equity by Thomas E. Brown against Henry C. Lang, setting forth that complainant and defendant, in the year of 1840, bought from Morgan Brown, the father of complainant, a tract of land containing nine hundred acres, and formed a partnership for the purpose of erecting a saw and grist mill. That complainant being under age, it was agreed that title to said land should be made to defendant alone, but that complainant should pay half the purchase money, and that upon the payment thereof, and half the expense of erecting said mills, that defendant would execute to him, or to Morgan Brown, titles to one moiety of said premises and improvements; and that this agreement was contained in an obligation in the form of a penal bond executed by defendant, and dated 20th April, 1840, and which is made an exhibit to the bill. That said mills were erected and went into operation in 1841; that they were built by the joint labor and expenditure of complainant and defendant, at the cost of about two thousand dollars, of which amount complainant contributed about six hundred dollars in money, and about seven hundred dollars in work, lumber, provisions, and other materials, and that complainant likewise paid his half of the original purchase money of the land.

The bill further states, that said mills were under the superintendence and direction of defendant, from the time of their completion in 1841, till 1846, when said partnership was dissolved; and that during all that period, defendant received the income and profits thereof, amounting to one thousand dollars per annum.

The bill further states, that defendant refuses to account with complainant for said income and profits, or to make and deliver to him titles to one-half the said land and mills, and prays that he be decreed to account and to specifically per-

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form the contract aforesaid, in relation to said premises, and to execute titles to complainant for one moiety thereof.

The answer of defendant admitted the purchase of the land, and the formation of the partnership, as stated in complainant's bill, and that complainant paid one-half the purchase money; that defendant did agree, that upon the payment by the complainant of one-half the purchase money, and one-half the expenses incurred in erecting said mills, that he would execute to him titles for one-half of said premises.

The answer further alleges, that defendant expended in the erection of said mills \$2,370 00; that complainant worked on said mills while they were being built about six months, and his services might have been worth one dollar per day, but denies that he furnished lumber or hands to the amount of seven hundred dollars, or any sum, or that he furnished provisions to an amount exceeding fifty dollars.

The answer further states, that defendant paid out other large sums in repairing the dam and machinery of said mills, which were twice injured by high water and freshets. He denies that the income and profits of the mills were as large as stated by complainant, but on the contrary, avers that they were not more than sufficient to pay expenses, &c.

To his answer defendant appended the following exhibit, and declared his willingness and readiness to make titles to complainant for one moiety of the land and mills, upon payment of the money expended by him in the erection and repairs of said mills.

The following is the exhibit to defendant's answer, viz:

HENRY C. LANG,		Cr.
1840	By amt. paid for half the land,	\$1,100 00
"	" expenses building mill,	2,370 00
1841	" repairing,	900 00
1842	" expenses of grist mill,	200 00
"	" " repairing dam,	600 00
Carried over,		\$5,170 00

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Brought over, - - - - -	\$5,170 00
1842 By expenses of working mills from 1841 to 1846, - - - - -	2,500 00
	<u>\$7,670 00</u>
Dr. To receipts of mills from 1841 to 1846,	3,500 00
	<u>\$4,170 00</u>
THOMAS E. BROWN,	Cr.
1840 By amt. paid for half land, \$1,100 00	
" 6 months work, - 150 00	
" provisions furnished, - 50 00	
	<u>\$1,300 00</u>
To amt. received from mills - 500 00	<u>\$800 00</u>
	<u>\$3,370 00</u>
Due to Henry C. Lang, - - - - -	\$1,685 00
Int. from 1st Jan., 1842, - - - - -	2,156 00
	<u>\$3,841 00</u>

The case was heard upon the bill, answer and proof; and after argument, counsel for defendant requested the Court to charge the jury, "that without some evidence of the assent on the part of Morgan Brown or his representatives to this suit, the Court will not decree a specific performance of the contract contained in said bond;" which charge the Court refused, but charged, "that if the jury found that complainant had not paid defendant one-half the expenses of erecting the mills, yet they might decree against defendant a specific performance of the contract, at the same time requiring and decreeing that complainant should pay one-half said expenses, or so much thereof as they might find unpaid and due to defendant.

To which charge and refusal to charge defendant excepted

The jury returned the following decree: "We the jury decree that the defendant, Henry C. Lang, do make a good

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and lawful title to the complainant, Thomas E. Brown, of the one-half interest in the land described in said bill; and that the said Henry C. Lang do pay to the said Thomas E. Brown, the sum of seven hundred and fifty dollars; and we decree costs to complainant."

Whereupon, defendant moved for a new trial, upon the grounds that the verdict was contrary to law and the evidence and the charge of the Court; and upon the further ground that the charge and refusal to charge of the Court, as above stated, were contrary to law.

After argument, the presiding Judge refused the motion for a new trial, the complainant having first remitted and released the sum of seven hundred and fifty dollars found for him by said verdict.

To which decision counsel for defendant excepted, and assigns the same as error.

WM. S. ROCKWELL, for plaintiff in error.

JNO T. SHEWMAKE, *contra*.

By the Court.—LYON J. delivering the opinion.

On the trial, complainant put in evidence the bond of Henry C. Lang, of which the following is a copy:

"GEORGIA, WASHINGTON COUNTY.

Know all men by these presents, that I, Henry C. Lang, am held and firmly bound unto Morgan Brown, in the penal sum of twenty-two hundred and eight dollars, the payment of which, well and truly to be made, I bind myself, my heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Witness my hand and seal, this twentieth day of April, 1840.

"The condition of the above obligation is such, that whereas, the said Henry C. Lang has warranty titles to three several tracts of land, containing in the whole, nine hundred and sixty acres, more or less; one tract called the Martin tract,

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on the south side of Lamar's creek; the other two tracts lying the north side of said creek, called the Nancy Hodges and Hugh Gilmore tract, lying broad side of each other; and whereas the said Henry C. Lang and Thomas E. Brown have undertaken and agreed to build a set of saw mills, and grist mill, if deemed necessary, upon and across said Lamar's creek:

"Now, if the said Thomas E. Brown, or the above named Morgan Brown, shall pay one-half of all the expenses of building and erecting the said mills, including the services of the said Henry C. Lang, at such price per day as shall be hereafter agreed upon, in articles of agreement, to be entered into between the said parties, then, and when the said Thomas E. Brown or Morgan Brown shall pay the one-half of the expenses of building and erecting the mills aforesaid, or shall release the said Henry C. Lang from all the liability for the one-half of said expenses of said mill, then, and in that event, the said Henry C. Lang binds and obligates himself, his heirs, executors, administrators and assigns, to make and execute good and sufficient titles to the one moiety or half of said three several tracts of land and mills, and such other improvements as shall be erected thereon, to the said Thomas E. Brown, or to the said Morgan Brown, or both, as shall be required when the said mills are done, and one-half of of the said expenses paid as aforesaid, then, on the due and faithful executing titles as required, this bond to be null and void, or else to remain in full force and virtue, in law and equity.

"Given under my hand and seal, this the day and year above written.

HENRY C. LANG, [L. s.]

"Signed, sealed and delivered in the presence of

NATHAN RENFROE,

WILLIAM RENFROE."

The complainant also put in evidence certain parts of the answer of defendant, and introduced *John Massey*, who tes-

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tified: That he was frequently at the mill during the progress of its erection; that his father, Bennett Massey, worked there during the time of the erection of the mill, and after its completion about one year; that his services were worth one dollar per day; that he received in payment some bacon and meal of complainant; that he saw negroes there that belonged to Morgan Brown, viz: Levi, George and Isaac, working during the time of its erection; also wagon, cart and teams, that belonged to Morgan Brown, used at the mill of complainant and defendant, during the time of its erection; he supposes they were furnished by complainant; he saw them at the place where Thomas E. Brown lived. That defendant rented the land, in the year 1850, to Lyons; that he received thirty-five dollars for rent of land; planted in cotton; that he saw him receive seven or eight cart loads of corn—a load containing ten or twelve bushels, worth seventy-five cents per bushel; witness thought about one hundred bushels of corn. That defendant rented the land to Cheeves in 1851; he supposes about thirty-five acres, worth about fifty cents per acre; that defendant worked on the mill during the time of its erection; witness supposes his services worth as much during the erection of the mill; that the defendant had the general superintendence of the mill from 1841 to 1846; that after the erection of said mill, complainant was at the mill about as much as defendant; that during the erection complainant worked at it.

Levin Lord, sworn on behalf of complainant, who testified: That the mill broke twice—once in 1841, and in 1846; that the tumbling dam was 196 feet long, and the dirt portion 120 feet long; the first broke; that about half the tumbling dam washed away; that the neighbors gave defendant some work, in repairing the injury; that witness gave one day's work; don't know how long it took, or how much it cost to repair the injury; the last, a portion of the dirt dam, was washed away 40 or 50 feet; lived on the place; was near the mill at the time of the first break, and was there occasion-

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ally, and saw four or five hands working there, and that some were complainant's; damages in 1846 witness thought slight.

Thomas Lyons, sworn on behalf of complainant, testified: That he rented the land belonging to the mill tract in the year 1850 of defendant; that he paid thirty-five dollars rent for the cotton land, and one-third of the corn, supposed to be 60 or 70 bushels, to defendant; defendant admitted to witness that he rented land of mill tract to Abner Cheeves in 1850 and 1851.

Zeby Smith, sworn on behalf of the complainant, testified: That the mill broke in 1846; that the neighbors assisted in repairing the injury; don't know how many hands hired on the repairs; witness worked one week; don't know the length of time or cost of repairs; did not charge for his work; the neighbors of the upper settlement, for their accommodation, it being the nearest mill, gave defendant a week's work in repairing damages; witness never knew of any charge for their work; about 20 feet of the dirt dam was washed away next to the waste ways.

Isaac Mays, sworn on behalf of the complainant, testified: That about one-half of the tumbling dam, and a small portion of the dirt dam, was washed away by the freshet of 1841; that the repairs were made with the old timbers, which had washed out; that the neighbors gave some work in repairing the breach; don't know how long it took to repair the injury, or what it cost; Brown had hands there in repairing; in 1846 the dirt dam broke to the extent of forty or fifty feet, and witness sent a hand two days, and the neighbors sent help to repair it; damage was repaired in 10 or 12 days at the farthest.

Defendant put in evidence other parts of his answer, which had not been read by complainant. It was distinctly admitted in the answer, that, at the time of making this agreement, complainant was an infant; that he had paid for one-half the land; that defendant was holding the title in his name, for an indemnity for complainant's share of the expenses of

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the erection of the mill; that the complainant, at the time of the agreement, was totally destitute of property; and that he, defendant, was induced to enter into said partnership, and to purchase the tract of land, on the representation of Morgan Brown, the father of complainant, that he, the said Morgan, would advance his son, the complainant, all the funds necessary to defray one-half the expenses of erecting and putting in operation said mills; that complainant had himself worked on the mills the whole time of their erection, &c.

The defendant answered further, that the mills were erected at a cost to him of \$2,370; that the dam had broken three times, the repairs of which cost him at one time \$900, and at another \$600, and the third time \$400; that he had added a grist mill, at a cost of \$200; that he had realized from the profits of the mill, after deducting all expenses, the net sum of \$1,500; that defendant had received in the mean time about \$500; and appended in his answer a statement which, in his answer, he refers to, as presenting a full and true statement of the copartnership transactions, and that statement shows a balance of principal and interest claimed to be due defendant, of \$3,841 00.

[1.] The first alleged error complained of, was the refusal of the Court to charge, as requested by defendant, and that simply involves the question, whether Morgan Brown, or his representative, was a necessary party to the bill. It is true that Morgan Brown was the obligee of the bond, but the whole instrument, in connection with the answer of defendant, shows that he had no interest whatever in the transaction; that his name was inserted for his son's benefit, who was a minor, and that if title had been made to him, he would have held it in trust for his son, the complainant. Then, as he had no interest, and could have taken none under that agreement, it was not necessary to make him or his representative a party. The Court was therefore right in refusing the request.

[2.] We see nothing exceptionable in the charge as given.

The whole question for the consideration of the jury was, whether the complainant had paid or contributed his half of the expenses of the erection of the mill; and if not, what was the balance still due by him on that account, to the defendant. If there was no balance due, complainant had a right to have a conveyance for one-half the lands. If there was a balance, it was not only proper, but the duty of a Court of Equity to ascertain what that balance was, and order its payment. The parties could not agree upon it, and how else was that question to be settled? And when that balance should be ascertained, it was the duty of the Court to shape its decree, so as to protect both parties; and we think the Court submitted the question fairly to the jury. Had a balance been due by complainant, according to the verdict of the jury, the charge contemplated the payment of that balance, upon the execution of the conveyance—the one depended on the other. How the rights of defendant were put in jeopardy, or how the jury could have been misled by the charge, it is impossible for us to see. Suppose there had been a balance due to defendant, and the jury had so decreed, but the complainant, from his insolvency, could not have paid it, would he, in consequence of such inability to pay that balance, have lost what interest he did have in the land? Certainly not. On the contrary, the Court would have directed a sale of the premises, and from the proceeds paid, first, that balance to the defendant, and the remainder to the complainant, to whom it in equity belonged.

The only remaining question is, whether the verdict of the jury, was contrary to the evidence, the weight of evidence, or the charge of the Court.

[3.] As the Court submitted the case to the jury fairly on the facts, we need only inquire, whether the verdict was contrary to the evidence, or weight of evidence. To justify this Court in granting a new trial on this ground, the verdict must be manifestly, and palpably contrary to the evidence, so clearly so, as to strike the mind at the first blush. A new

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trial will not be granted upon matters of facts, unless upon the most unequivocal evidence, that injustice has been done the party complaining.

A verdict will not be set aside, and a new trial granted, when the case has been fairly submitted on its merits, and no rule of law violated, nor manifest injustice done; although there may appear to have been a *preponderance* of evidence against the verdict; especially if the Judge who tried the case is satisfied with the finding.

These are some of the rules this Court has laid down by which it will be governed in applications for new trial on this ground.

Let us test this application by these rules: The complainant and defendant, had purchased the tract of land together; complainant had paid his half of the purchase money; and defendant continued to hold the titles in his name, for the half that belonged to complainant, to secure and protect himself from any loss, on account of complainant's half of the expenses of the erection of the mills; in other words, the defendant's claim on complainant's half of the land, was in the nature of a mortgage, to secure himself against that half of the expenses of the building of the mills, which the complainant by his contract was to pay; or such part of the same, as he should be compelled, by reason of his connection with the transaction, to contribute or advance, either in money, labor or material, over and above his own share. In this view of the case, and it is a simple and true one, it was incumbent on the defendant, to affirmatively show, how much more than the one-half of the whole expenses of building, he had contributed or advanced; or, how much of complainant's half was still unpaid, and was still due, and owing to him on this account, so that the Court might specifically enforce its satisfaction, out of complainant's part of the land, according to the contract of the parties. To show what that balance was, the defendant relies on the statements in his answer. The answer, in our opinion, is very unsatis-

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factory for that purpose. The charge in the bill, to which defendant responds, is this: "In pursuance of said agreement, the said mills were erected and completed, and put into operation in the year 1841, by the joint labor of complainant and defendant, at the cost of about the sum of \$2,000, to which amount, complainant contributed about \$1,900, in money, lumber, hands, provisions and other materials." Defendant, after admitting that about the 1st of April, 1840, he and complainant hired hands, and commenced the work; and that the mills were completed, so as to commence sawing about the first of the year 1841; adds that, "it was done, at an expense to him of \$2,370, including the charge of defendant, for two hundred days work, in building the mill, at the rate of three dollars per day, making \$600, which per diem wages was agreed on, between complainant and defendant, at the time of the commencement of the work." This sum of \$2,370, is stated in round terms; no items, except that of his own labor, are furnished, so that complainant might attack them; no evidence whatever, of what he furnished in the way of materials, provisions, hands or money, to swell his account to this large sum. It was unsupported by the first particle of testimony; besides, it is not in response to any charge in the bill. The charge was that the mill was built by their joint labor, at the cost of about \$2,000; that is not answered; and nothing is said in the bill, as to what was, or was not the expense of the defendant. The jury were then at liberty to disregard that item. It was in proof, however, that the complainant worked on the mill, during the whole time of its erection. By John Massey, that Bennett Massey worked on the mill during its erection, about one year, and his services were worth one dollar per day; that complainant paid him for his work, in some bacon and meal; and that he saw three negro men belonging to Morgan Brown, working on the mill during its erection; furnished as he supposed by complainant; also, wagon, carts and teams, belonging to Morgan Brown, em-

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ployed in the erection of the mills. He supposed that they were furnished by complainant, from the fact, that he saw them at the place where complainant lived." Suppose, however, that complainant did not furnish these hands and teams, but that Morgan Brown did, is it likely, that defendant would have paid Morgan Brown for their use, when it was a part of the agreement; and which induced the defendant, as he says, to enter into it, that Morgan Brown would advance the means necessary, to enable his son, the complainant, to contribute his share of the expenses? It is hardly probable. With all this evidence, in support of complainant's compliance with his part of the agreement, defendant offers nothing to show, that in the employment of hands, furnishing materials, paying out money, &c., he contributed more than his half of the expenses of the building of the mill, and nothing towards even that, except his own labor.

We think, here was sufficient evidence to induce the jury, to conclude, that complainant had contributed, at least, his share of the expenses, in building the mills. At all events, with this evidence before us, we will not interfere with the finding.

In addition to the item of \$2,370, defendant claims in his answer, that he was put to an expense of \$900, in repairing a breach in the dam, and an injury to the mill in 1842. Again, in 1846, by another breach of the dam, of \$600. Each of these statements, like the first, is unsupported by evidence, or specifications of items; and the evidence offered, shows, that not only complainant with his hands, assisted in each of the repairs, but that the neighbors gave their assistance, freely, in repairing the breaches, without any charge. That the breach of 1846, was slight, and was repaired in ten or twelve days. And, in addition to all this, the defendant had the entire use of the mills, from their erection, until the mills were abandoned, excepting a few mill accounts, that were collected by complainant, not ex-

ceeding in the whole, \$500, together with the use and rent of the land the whole time.

It is said, that the jury made a mistake in their verdict; that instead of finding a balance of \$750, due by complainant to defendant, as they intended; their finding was \$750 against defendant, and in favor of complainant. There is no foundation in the record, to warrant the conclusion, that there was a mistake; on the contrary, much to satisfy us, that the finding of the jury was just what they intended.

From all the evidence before the jury, it was fair for them to conclude that complainant had in the erection of the mills, and repairing breaches, contributed fully, his share of the expenses and labor in so doing. And as defendant had the entire use of the mills, besides the rents of land, and had realized a net profit of \$1,500; therefore, according to his own showing, it was still more reasonable for them to conclude, that complainant ought to have half of that sum; and such no doubt was the result of their deliberations, and the true secret of that part of their verdict.

A jury of the county where this transaction occurred, and who had all the facts, the parties, their statements, and the witnesses before them, was the proper forum for the trial and adjustment of the differences between these parties; and having done so, after the case had been fairly submitted to them on its merits, no rule of law violated, nor manifest injustice done; sustained, as their verdict is, by the evidence, as we think, their action must be final and conclusive.

Judgment affirmed.

Oliver vs. Wilson.

JAMES W. OLIVER, plaintiff in error, vs. E. B. WILSON, defendant in error.

- [1.] Attachment bonds are amendable in matters of form under the attachment Act of 1856.
- [2.] Where an attachment issues on the ground that the defendant absconds, a traverse of the fact is not obnoxious to objection, because it sets forth a place where the defendant was publicly living when the attachment issued.
- [3.] On the trial of such a traverse, the burthen of proof is on the plaintiff in attachment.
- [4.] When the defendant's manner of leaving a place is introduced to show that he was absconding, his sayings at the time of leaving, as to where he was going, are a part of the *res gesta*.
- [5.] It is error to charge the jury, that if a debtor is once shown to be absconding, he continues so until his creditors get notice of his new residence.
- [6.] Where there is no evidence of an absconding, except in the manner of leaving a place, it is error to charge the jury as to what may constitute an absconding afterwards, upon the assumption that there may have been no absconding in the leaving.

Attachment, in Charlton Superior Court. Before Judge COCHRAN, at October Term, 1859.

This was an attachment sued out by Elijah B. Wilson, against Oliver, on the ground, that he "absconds;" defendant traversed the ground upon which said attachment issued, and denied that he did abscond, as alleged in said attachment. He further stated that he removed to Chatham county, on the 12th August, 1858, where he has since openly resided up to the present time, and did reside there on the 13th Oct. 1858, the day upon which the attachment issued, and that he could alone be sued in Chatham county.

After announcing that he was ready, defendant's counsel moved to dismiss the attachment, on the ground that the bond did not recite that the attachment was returnable to January Term of the Superior Court, and that the attachment was not made returnable to any Court, but was left blank; and on the further ground that the bond was not attested.

The Court overruled the motion on all the grounds, and allowed plaintiff to fill up the blanks in the attachment, and defendant excepted.

Plaintiff then moved that all that portion of defendant's traverse, referring to his removal to Chatham county, and his open and public residence there, be stricken.

The Court granted the motion and defendant excepted.

The Court then held that the burden of proof was upon the defendant, and that he must establish the affirmation of the facts stated in his traverse. To which ruling defendant excepted.

Defendant then proved that he had resided in the county of Charlton for several years; that he left that county about the 1st August, 1858; traveled by public road in the day time. (The Court refused to allow defendant to prove what he said as to where he was going. To which decision defendant excepted.)

That he did not leave until the Thursday after his house and furniture had been levied on under attachment; his house was locked up and his family turned into one room without furniture; that this was on Monday. The levy was made about the 1st August, 1858. Defendant and his wife were absent when the levy was made; his children and brother and sister-in-law were there; horses, cattle and every thing that could be found, were levied on.

The presiding Judge charged the jury, that the only question for them was, whether the defendant was absconding at the time the attachment issued. To abscond, is to hide, to conceal one's self, to secretly keep out of the way, so that an officer cannot find him to serve process on him in the ordinary way.

If the defendant left the county clandestinely, it devolved upon him to show that he had a permanent residence in another county, and that plaintiff had notice thereof at the time the attachment issued. It is not necessary to constitute an absconding that the party should secretly run away. If

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he left publicly without giving notice to the public, of his intention, and afterwards concealed and hid himself, he absconds.”

To which charge defendant excepted.

The jury found for the plaintiff, and defendant excepted, and assigns as error the rulings, decisions, and charge above stated and excepted to.

WM. B. GAULDEN, for plaintiff in error.

LONG; and ROLL, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] We think the presiding Judge was right in refusing to dismiss the attachment on account of the formal defects in the bond; and in allowing those defects to be amended on motion. The attachment Act of 1856, page 38 of the Acts of 1855-'56, places the attachment, the bond, and the declaration, as to amendments, on the same footing as cases of common law, and these are amendable in matters of form by the Judiciary Act of 1799.

[2.] We think there was error in striking from the defendant's traverse of his absconding, (the ground on which the attachment had issued,) that part of it which set forth that he had had an open and public residence in Savannah for two months next before the issuing of the attachment. Proof of the fact alleged, was certainly pertinent to the issue, and though the defendant need not perhaps have alleged it in order to be admitted to prove it, yet the specific allegation only gave the plaintiff more definite information concerning the proof, and was surely no matter of complaint on his part.

[3.] We do not agree with the presiding Judge in holding, that, on the issue formed by the traverse of the ground on which the attachment issued, the defendant held the burthen

of proof. The plaintiff affirmed, that at the time when the attachment issued, the defendant was absconding, and the defendant denied the fact. The plaintiff clearly held the affirmative of the issue, which generally, if not always, carries with it the burthen of proof. I doubt whether an accurate analysis will leave a single exception to this important rule. There are many instances where a party holding the affirmative of a general issue, is bound to prove only a part of the issue, while the opposite party has the burthen of disproving the remainder. But I apprehend that in all such cases, the general issue is divisible into two or more distinct particular issues involved in it, and that of these particular issues, each must be proven by him who holds the affirmative of it, although the affirmative of some of them may fall on one party, and the affirmative of others of them, on the other party. Thus, on a charge of selling spirituous liquor without a license, the State clearly holds the general affirmative of guilt; but this affirmative is divisible into two necessary propositions, of which one is affirmative and the other negative, and so the State has the burthen of proving the sale of the liquor, while the defendant has the burthen of proving that he had a license, each being required to prove the affirmative which he holds on each of those particular issues. This is a rule of *proof*, not of pleading, and can not be affected by the plaintiff's affidavit to the truth of his side of the issue, for that affidavit is no *part of the evidence*, and therefore, does not enter into the proof at all, and cannot shift the burthen of it. The affidavit is a part of the pleading, not of the proof; is a prerequisite to the presentation of the issue, but not any evidence to affect a decision of the issue when formed. The statute *expresses* no such effect of it, and it would do violence to an important general principle to infer it. The inference would also be against the analogies of other cases. All dilatory pleas must be supported by affidavit, but yet, whenever one is put in which takes the affirmative of an issue, the pleader also takes the

burthen of proof. The plea of a misnomer of the defendant, for instance, must not only deny the name imputed to him, but must also state the name which belongs to him; and having stated it, he has the burthen of proving it, although he has previously sworn to it. So the plea of non-residence in the county where the suit is brought, must not only deny the defendant's residence in that county, but also set forth his residence in another county. He must swear to this plea, and yet, after having sworn to it, he must take the burthen of proving it. The oath is only a prerequisite of presenting the issue, as it is in the plea of *non est factum*, but the issue being once presented, the general rule of proof must prevail in all cases where the statute has made no exception, and he who holds the affirmative of the issue, assumes also the burthen of proof.

[4.] We think the Judge was wrong in excluding evidence of what the defendant said when he was leaving Charlton county, as to where he was going. The evidence to show that he was absconding at the time when the attachment issued, was the fact that he had some time before left the county in a manner which the plaintiff contended was clandestine. It was perfectly proper to meet that case by showing that the manner was not clandestine, but that he said he was going, and told where he was going. What he said about his leaving at the time when he left, constitutes a part of the manner of the leaving—was a part of the *res gestæ*. The fact that he told some body where he was going is certainly not conclusive proof that his leaving was not clandestine, for it may have been told only to a chosen friend who was expected to keep the secret; but it was evidence on the point, and what he said ought to have been considered by the jury, in connection with the relations between him and the persons to whom it was said. If he told a special friend where he was going, it amounts to but little; but if he told it to people whom he casually met, it negatives the

idea that his leaving was secret or concealed from the public.

[5.] The Judge charged the jury, that if the defendant had left the county clandestinely, he could relieve himself from the presumption that he was still absconding when the attachment afterwards issued, only by showing that he had acquired a permanent residence in another county, and that the plaintiff in attachment had notice of it. We think this was error. When a man is once shown to have been absconding, I think there is a presumption that he continues so until the presumption is rebutted, but it surely may be rebutted by something short of actual notice to his creditors, of his residence. To be sure, the mere fact of his living publicly in a new place, does not necessarily rebut it, but it may do so. If a man should abscond from Augusta, the fact that he might afterwards live publicly in China, would not rebut the presumption that he was still concealing himself from the public of Augusta; but if he should go to Savannah and live there publicly for two months, one could scarcely believe that he was still hiding from a people, numbers of whom were daily visiting the place where he was showing himself to all comers and goers. It ought to have been left to the jury to determine whether the defendant had left Charlton county in a clandestine manner, and if so, whether the presumption that he was still hiding himself from the public of that county, was rebutted, after he had been living two months publicly in the city of Savannah. The force of the rebutting proof depends greatly upon the degree of intercourse between the place he left and the place where he stopped.

[6.] The Judge also charged the jury, that to constitute an absconding, it was not necessary that there should be a clandestine leaving; for though the defendant might have left publicly, yet if he afterwards concealed himself, he was absconding. The objection to this charge is, that there was no evidence, so far as this record discloses, to justify it. The

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absconding might truly have begun after he had left Charlton county, as well as when he was leaving, but if it had any existence, it must have begun somewhere, and there is no evidence before us that it began after he left the county. There is no shade on the residence in Savannah, except what may be cast by the manner of leaving Charlton. If he left that county with a fair record, it continued fair when the attachment was issued, so far as the evidence discloses to us; and it was therefore charging on hypothetical evidence, to instruct the jury as to what might constitute an absconding, after a public leaving. According to the evidence before us, if the absconding did not begin in leaving the county, it never took place.

Judgment reversed.

JAMES F. LUGRUE, plaintiff in error, vs. M. W. WOODRUFF,
defendant in error.

A letter written by the drawee to the drawer after the draft has been endorsed. and payment refused, although by its terms a sufficient acceptance, yet it is not without other proof available as such to the holder.

Complaint, in Richmond Superior Court. Tried before Judge HOLT, at October Term, 1859.

This was an action by James F. Lugrue against Minus W. Woodruff, on a draft, of which the following is a copy, viz:

“CHATTANOOGA, January 23d, 1858.

\$164. Three days after date, pay to the order of myself,

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one hundred and sixty-four dollars, value received, and charge the same to account of 202 sacks oats, marked W.

(Signed,)

R. HOOPER.

To M. W. Woodruff, Augusta, Ga."

(Endorsed,) "pay James F. Lugrue.

(Signed,)

R. HOOPER."

Noted and protested for non-acceptance, January 27th, 1858.

Noted and protested for non-payment, January 29th, 1858.

Plaintiff at the trial, offered the draft in evidence, to which defendant objected, on the ground, that it was not accepted on its face. The Court sustained the objection, and plaintiff excepted.

Plaintiff then offered in evidence the following letter from defendant to Hooper, the drawer of the draft, as evidence of acceptance :

" AUGUSTA, January 26th, 1858.

Mr. R. HOOPER :

Dear Sir: Your draft on the oats at three days was presented to day for payment, and the oats not yet arrived, and money as tight as bricks, it is almost impossible to collect any thing here, it is utterly impossible for me to pay the draft to-day, but as soon as the oats get here, I can realize on them immediately, and will then attend to the draft; it will be all right in a few days. If the draft should come back to you have it sent down again, and I will certainly arrange it; and send on all the oats you can, our market is almost entirely bare of them and a good demand at 60 to 65 cents.

Respectfully,

M. W. WOODRUFF."

Defendant objected to this letter, on the ground, that it was not an acceptance as to third persons, whatever it might be as to Hooper. The Court sustained the objection, and plaintiff excepted.

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Plaintiff then proposed to prove that the conditions expressed in the letter had been performed; that the oats did arrive and were sold, and the draft sent back to defendant. The Court rejected this evidence also, and plaintiff excepted.

There being no further evidence, plaintiff was nonsuited, and therefore tendered his bill of exceptions, assigning as error the above rulings and decisions.

JOHN H. HULL, for plaintiff in error.

L. D. LALLERSTEDT, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The proof in this case did not go far enough. It should have been shown, either that the letter written by Woodruff, and which we hold to be a sufficient acceptance, was written to Hooper before the draft was endorsed to the plaintiff, which we are quite sure was not the fact, or that the paper, after acceptance was refused, was returned to Hooper, and re-delivered by him to Lugrue, who took it upon the faith of the letter; or, that he advanced money or paid something of value upon it. If this proof can be supplied, the plaintiff will be entitled to recover. As the testimony stands, however, we hold, the Judge was right in awarding a nonsuit.

Judgment affirmed.

RICHARD W. ADAMS, plaintiff in error, vs. EMILY B. GUERARD, and others, defendants in error.

- [1.] Before our Act of 1821, making every estate one in fee, unless some less estate be expressed by limiting words, a marriage settlement conveyed the entire legal estate in real and personal property to a trustee, and declared a trust in favor of the husband and wife during the life of the longest liver of them, with remainder to their children, without using words to expressly confine the remainder, to a life estate, or to expressly extend it to a fee.
- Held*, That any resulting trust after the death of the children, was rebutted by a subsequent deed taken by the same parties, professing to follow the very same trusts expressed in the marriage settlement, and in doing so, expressing a trust in favor of the husband and wife during the life of the longest liver, with remainder to the children and their heirs.
- [2.] Possession under another, is adverse to everybody but that other under whom it is held.
- [3.] Courts of Equity will not relieve from the bar of the statute of limitations, where a party has remained inactive from ignorance of his rights, nor do they relieve from the bar, unless the subject matter was pending in some Court before the bar attached.
- [1.] When one conveyance to a trustee, directs him to make another of the same kind to a third person, equity will dispense with the second conveyance, if the first will produce precisely the same result, operating as a conveyance under the statute of uses.

In Equity, in Chatham Superior Court. Before Judge FLEMING, June Term, 1859.

This was a bill in equity, by Richard W. Adams, against Emily B. Guerard, and others, devisees and heirs at law of Robert G. Guerard, deceased, praying for a discovery, relief, and account.

The bill states, that on the 30th January, 1840, in contemplation of a marriage, about to be solemnized between complainant and Mary Emma Guerard, a marriage settlement was executed by and between them, and one Robert G. Guerard as trustee, by which certain real and personal property in which the said Mary Emma had a vested estate in remainder, after the termination of a life estate, (created by two deeds, one a marriage settlement between Peter Guerard

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and Elizabeth Haist, the father and mother of said Mary Emma, the other a deed made by William Parker, to Steel White, trustee,) was conveyed to said Robert G. Guerard as trustee, to hold the same in trust "for the joint benefit and behoof of the said Mary Emma and Richard W., during their coverture, (not subject however to the debts, contracts or engagements of the said Richard W.) and for the benefit and behoof of the survivor of them, for and during the term of his or her natural life; and from and after the death of the survivor of the said Mary Emma and Richard W., then in further trust to convey the said real and personal estate to the issue of the said marriage, share and share alike, if more than one, his, her or their heirs and assigns forever, as tenants in common, free from any trust; but if either the said Mary Emma or Richard W., shall die without leaving issue of the said marriage, living at the time of such death, then in trust, to convey the said real and personal estate to the survivor of the said Mary Emma and Richard W. Adams, her or his heirs and assigns, free from any trust, and for no other use, trust or benefit whatsoever," &c. Copies of said marriage settlement, and also of the marriage settlement between said Peter Guerard and Elizabeth Haist, and of the deed from William Parker, (by which two latter deeds, the estate in remainder to said Mary Emma, was created,) are appended below, marked A. B. and C.

The bill further states, that the property conveyed in said marriage settlement, consisted of an undivided third part of the real and personal estate mentioned in said deed of marriage settlement between Peter Guerard and Elizabeth Haist, and in the deed from Parker; the said Robert G. Guerard and one Augustus Guerard, the brother of the said Mary Emma, being entitled to the other two-thirds in and under said deeds; the limitations in said deeds being to the children of the said Peter and Elizabeth, and in all of which property the said Peter at the time of the execution of the

deed of marriage settlement aforesaid, between complainant and the said Mary Emma, possessed an estate for life.

The bill further alleges, that the said Robert G. Guerard accepted the trusts in said deed of marriage settlement, and that he never afterwards renounced or was discharged from the same.

The bill further states, that the said Mary Emma and complainant were married the day after the execution of said marriage settlement, and that the said Mary Emma died on the 31st day of October, thereafter, (1840,) without issue, and leaving complainant surviving; and that thereupon, it became the duty of said Robert G. Guerard, as trustee, in accordance with the provisions of said marriage settlement, forthwith to convey absolutely to complainant the whole estate which had been conveyed in trust as aforesaid by said deed of settlement.

The bill further states, that the said Peter Guerard, tenant for life as aforesaid, died on the 25th December, 1842, when the right to the enjoyment and possession of said estate in remainder accrued, and it became the duty of said Robert G. trustee as aforesaid, to convey absolutely to complainant the one-third part of said estate, but which he failed and neglected to do. But upon the death of the said Peter, the said Robert G. took possession of the whole of said real and personal estate, held by said Peter for life, and collected and received from time to time, the rents, issues, and profits thereof, until the 26th October, 1853, when he died. And upon his death, the said Emily B. Guerard, his widow, and only qualified executrix, possessed herself of all said real and personal estate, and has continued in the receipt of the rents, issues and profits thereof, ever since, and the said estate is now in possession of the devisees, and heirs of said Robert G. Guerard, deceased.

The bill prays for a conveyance of one-third of said estate, real and personal, to complainant, and that defendants be

decreed to account to and with him, for one-third of the rents, income and profits thereof.

The answer of defendants admits the facts stated in the bill as to the marriage of complainant and the said Mary Emma Guerard, and the execution of the deed of marriage settlement between them, and the marriage settlement between Peter Guerard and Elizabeth Haist, and the deed of Parker, as stated in the bill.

The answer further alleges, that after the death of the said Peter Guerard, the said Robert G. took and retained possession of the property, which the said Peter held, as tenant for life, in his individual right, conjointly with his brother, Augustus Guerard; and that the said Robert G. and Augustus, were the only surviving children of said Peter and Elizabeth, at the time of his, Peter's, death; and defendants deny that said Robert G. ever held said property as trustee, under said deed, or as part property, to which complainant had any right or title.

The defendants in their answer, further allege, that complainant with full knowledge of the claim of said Robert G., and of his disclaimer of any trust in connection with his possession of said property, acquiesced therein, and never asserted any title, interest, or claim in or to the same, from the time it came into the possession of said Robert G. until shortly before the filing of his bill.

Defendants plead lapse of time, and the statute of limitations as a bar to complainant's claim or title.

Defendants further say, that after the death of said Peter, Robert W. Pooler, was appointed trustee of said property, and at the May Term, 1843, of the Superior Court of Chatham county, the said Robert G. and Augustus Guerard, filed their bill on the equity side of said Court, against the said Pooler, alleging that they were the only surviving children of said Peter and Elizabeth, and entitled to all of said property, and praying that the same might be conveyed and delivered to them by said Robert W. Pooler, trustee as afore-

said; that a decree was passed, and a conveyance made to them by Pooler, of all said property in fee, as tenants in common, and that said deed was immediately recorded in the proper office. And that it was thus that said Robert G. and Augustus, took possession of said property, claiming it as their own.

They admit that complainant requested them to convey and deliver to him the property, and to account for the rents and profits thereof, as stated in the bill, and that they declined so to do, and deny his right to said property, or to call defendants to any account touching the same.

The cause was submitted to the jury upon the pleadings, proofs and charge of the Court.

Evidence for complainant.

Thomas Purse, testified: That the real property in Derby ward, mentioned in the bill, to-wit: Lot of land number five, in Wilmington Tything, with the improvements, was valued in the year 1845, by the city assessors at \$12,000, there being on said lot two-story buildings, a third story having been afterwards put on one of the buildings; that the same valuation was put on said property in 1850; that in 1854, it was valued at \$30,000, and that such was the present valuation; that from the year 1845 to the year 1850, the real property in Columbia ward, mentioned in the pleadings, with the improvements, was valued at \$9,000, and that in 1854, the valuation was \$12,500, that in 1857 and 1859, the valuation was \$12,000, and that he thought the annual rent of last mentioned property was worth \$700, and that the improvements on this property were there before 1843.

On the cross-examination, he stated: That he thought the foregoing valuations were full high; one of the objects of the valuation being to have the burden of taxation on real estate bear equally on each owner, in proportion to the relative value of his property.

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William H. Gladding, City Treasurer, sworn : Testified to the genuineness of the books produced by him, as the books in which were entered the assessments and the names in which the returns were made from the year 1843 to the year 1858, inclusive; and that by these books, it appeared that in 1843, all said property was returned as the property of estate of Peter Guerard, by Robert W. Pooler, trustee, the Derby ward property being valued at \$10,000, and the Columbia ward property at \$8,000; that in 1850, the property was returned as that of estate of Peter Guerard, by R. G. Guerard, the Derby ward property being valued at \$12,000, and the Columbia ward property at \$9,000; that in 1857, the Derby ward property was returned as that of estate of Peter Guerard, and that in Columbia ward as the property of Mrs. E. B. Guerard; that in 1852, the property was returned by R. G. Guerard as property of the estate of Guerard; that in Derby ward valued at \$15,000, and that in Columbia ward at \$9,000; that in 1845, the property was returned by R. G. Guerard as that of estate of Guerard; \$12,000 being the valuation of the Derby ward property, and \$9,000 that of the Columbia ward property; that in 1849, the property was returned by R. G. Guerard as that of the estate of Guerard; the valuation being the same as that of 1845; that in 1855, the property in Derby ward was returned by Mrs. E. B. Guerard as that of estate of Peter Guerard, valuation \$30,000, and the Columbia ward property was returned as hers, valuation \$12,500. This witness stated, also, that on examining the books, he did not find that Robert G. Guerard ever returned the property as his own.

The county tax-digest for the year 1849, offered in evidence by complainant, showed that the Columbia ward property was returned that year by R. G. Guerard, as the property of the estate of Guerard.

Complainant's cause being here closed, defendants offered *William F. Law, Esq.*, as a witness, who testified that he had

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a conversation with Mr. Richard W. Adams in the spring of 1843, shortly after the death of Mr. Peter Guerard. Mr. Adams asked witness his opinion if he, Adams, had any rights to the property under his marriage settlement. It was a street conversation. I told him I could give no opinion without seeing the papers. He said he could get copies of the papers at the Court-house. He spoke of what he deemed his rights. Witness told him to get his papers and come to the office for an opinion (meaning the law office of William and William F. Law). That he did subsequently come to the office, when, as witness believes, Mr. R. G. Guerard was in the office; witness is almost sure that Guerard was there when Adams called at the office, for witness's desk was near the door, and he had a strong impression, that seeing Mr. Adams approach, witness met him at the door and stopped him; he can only account for this from the fact that Guerard was in the office at the time; witness then stated to Mr. Adams that he could not get an opinion from the office, as it had been previously retained by Mr. Guerard who was then receiving an opinion; I had a subsequent conversation with Mr. Adams; he told me he understood he had no rights, and had abandoned the matter. He said he had taken no legal advice; that he had learned from Robert Guerard, that he, Adams, had no rights to the property.

On the cross-examination, the witness states that the first conversation he had with Adams was a street conversation; and whilst he believes that Adams referred to and stated the trusts of the marriage settlement, yet at this time (the time of testifying) witness cannot remember what those trusts were, it having been a long time since that conversation. Witness cannot state the precise language of Adams; he told me Mr. Peter Guerard was dead, and that if he (Adams) had any rights, he wished me to investigate them for him.

William P. White, Esq., being also sworn on behalf of the defendants, testified as follows: Had a conversation with Ad-

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ams in reference to his claim under marriage settlement ; it was a long time ago ; does not recollect the date ; thinks it was after Mr. Peter Guerard's death ; it occurred in the street, near the Pulaski House ; Adams said he was poor, and if he had any rights he wanted them, otherwise not ; witness told him he did not know if he had rights, but advised him to see Major Guerard, who was an honorable man and would do what was right ; witness afterwards saw Mr. Guerard, who told witness he had taken legal advice, and that he wished Mr. Adams to do the same ; Major Guerard claimed the property, and denied that Mr. Adams had any right to it ; witness thinks he subsequently communicated this conversation to Adams ; he is pretty sure he did so ; Major Guerard denied any right of Adams, and Adams knew it ; there can be no doubt that Guerard set up adverse claim, and that Adams knew it.

The evidence being closed on both sides, and argument had, complainant's counsel requested the Court, in writing, amongst other thing, to instruct the jury :

That the deed of marriage settlement between Peter Guerard and Elizabeth Haist, (a copy of which is exhibited to said bill of complaint,) conveyed to their children a remainder in fee as to all the property embraced in it—which remainder vested as said children severally came *in esse*.

That the marriage settlement of Mary Emma Guerard, (a copy of which is also exhibited to said bill of complaint,) conveyed, to her trustee therein named, all the rights of said Mary Emma, at law, in and to the interest of the property embraced in said settlement, upon executory trust to convey the same to complainant under the contingencies which afterwards happened, to-wit, the death of the said Mary Emma (living the said complainant,) without leaving issue of their marriage living at the time of her death.

That it was the duty of such trustee, at the death of said Mary Emma, to convey said interest to complainant ; and

that his failure to do so then or at the death of the life-tenant, Peter Guerard, was a breach of trust.

That the obligation or contract of the said trustee, under his hand and seal, was a covenant, and his failure to perform it was a breach of covenant.

That the complainant's suit was founded on the trust deed; it was brought to enforce the trust; that whatever rights complainant had, they grew out of the deed; and that if this were a case wherein the statute of limitations would be applicable, the bar prescribed for sealed instruments would be the bar alone available for the defendants.

That complainant's appropriate, peculiar and only remedy, if he ever had or then had any, was in a Court of Equity.

That this being the case of a direct trust, executory in its character, and cognizable only in equity, the statute of limitations could apply to it only by analogy in its application to legal rights, and that the legal remedy for breach of a covenant or obligation under the hand and seal of the party, would not be barred under twenty years after the right or cause of action accrued.

That even if complainant had a legal remedy, and the statute of limitations applicable to it was the statute applicable to suits for the recovery of real and personal property, yet the trustee's denial or repudiation of the trust, to admit the running of the statute in favor of the trustee, must be open and must be brought home to the knowledge of the party in interest; and that these rules apply as well to persons claiming under or through a trustee, (and not being *bona fide* purchasers for a valuable consideration without notice) as to the trustee himself; and that the burden of proof is on the trustee and those claiming under him, as volunteers, or with notice of the trust.

That if the jury should find, from admissions in the pleadings, or other evidence in the cause, that the claim of the trustee in this case was founded in mistake or misapprehension of the rights of the complainant, then neither the statute

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of limitations nor the rule of Courts of Equity in analogy thereto, would operate against complainant, until the discovery of such mistake; and, the more especially, if the mistake was mutual; and that a possession which is the result of ignorance, inadvertence, misapprehension or mistake, will not work a disseisin.

That there can be no disseisin of a trust; and although a trust may be extinguished by lapse of time, yet a Court of Equity, acting in analogy to the rule of law, will not bar a trust, where, if there had been a legal remedy, the statutory bar would not apply at law.

That the confidential relation between trustee and *cestui que trust*, requires the former to give notice to the latter of every act or fact adverse to the interests of the *cestui que trust*; and, especially, where the interests of the trustee and *cestui que trust* conflict.

Whereupon, amongst other things, the said Judge charged the jury that, previously to the year 1821, words of inheritance were necessary, in Georgia, to create a fee simple as well in equitable as in legal estates; that under the marriage settlement of Peter Guerard and Elizabeth Haist, the children of the marriage did not take estates in fee simple, but only estates for life, in the real property. To which charge or instruction complainant by his counsel excepted.

The Court further charged the jury, that as between the complainant in this case and said Robert G. Guerard, his trustee, the statute of limitations was applicable and sufficient to bar complainant's remedy, if knowledge was brought home to complainant that his trustee was holding adversely to him. To which charge or instruction complainant by his counsel excepted.

The Court further charged the jury, that a mistake or misapprehension of law by a trustee and *cestui que trust*, as to their respective rights, would not be sufficient to relieve the *cestui que trust* from the operation of the statute of limitations against him; that if a mistake could avail the *cestui*

que trust, it must be a mistake of *fact* and not of law. To which charge or instruction complainant by his counsel excepted.

The Court further charged the jury, that if they found that complainant in this case had knowledge of the adverse holding of his trustee, then the statutory bar applicable to the case would not be the bar of twenty years prescribed for sealed instruments, but the bar of seven years as to the realty and four years as to the personalty. To which charge or instruction complainant by his counsel excepted.

The Court further charged the jury, that Courts of Equity will apply the bar of the statute of limitations, as at law, to the rights of a complainant, although the complainant might have had no remedy at law. To which charge or instruction complainant by his counsel excepted.

The jury retired and returned with a decree for the defendants, and that complainant's bill be dismissed with costs. The said Court, then, to-wit, on the 8th day June, in said year 1859, adjourned for the Term.

Whereupon, counsel for complainant tender this the said complainant's bill of exceptions to said charges, and the omissions to charge as requested in writing as aforesaid, and to said instructions and decree, and say :

1st. That the Court erred in charging the jury, that the children of Peter Guerard and Elizabeth Haist did not, under the said marriage settlement of said Peter and Elizabeth, take estates in fee simple, but only estates for life in the real property.

2d. That the Court erred in charging the jury that, as between the complainant in this case and his trustee, the said Robert G. Guerard, the statute of limitations was applicable and sufficient to bar complainant's remedy, if knowledge was brought home to said complainant that his said trustee was holding adversely to him.

3d. That the Court erred in charging the jury, that a mistake or misapprehension of law by a trustee and *cestui que*

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trust, as to their respective rights, would not be sufficient to relieve the *cestui que trust* from the operation of the statute of limitations; that if a mistake could avail the *cestui que trust*, it must be a mistake of fact and not of law; and that the Court further erred in omitting to charge the jury, as requested, that if they should find, from admissions in the pleadings, or other evidence in the cause, that the claim of the trustee in this case was founded in mistake or misapprehension of the rights of the complainant, then neither the statute of limitations nor the rule of Courts of Equity in analogy thereto, would operate against complainant until the discovery of such mistake, and, the more especially, if the mistake was mutual, and that a possession which is the result of ignorance, inadvertence, misapprehension or mistake, will not work a disseisin.

4th. That the Court erred in charging the jury, that if they found that complainant in this case had knowledge of the adverse holding of his trustee, then the statutory bar applicable to the case would not be the bar of twenty years prescribed for sealed instruments, but the bar of seven years as to the realty and four years as to the personalty; and that the Court further erred in omitting to charge the jury, as requested, that complainant's suit was founded on the trust deed, it was brought to enforce the trust, that whatever rights complainant had, they grew out of the deed, and that if this were a case wherein the statute of limitations would be applicable, the bar prescribed for sealed instruments would be the bar alone available for the defendants.

5th. That the Court erred in charging the jury, that Courts of Equity will apply the bar of the statute of limitations, as at law, to the rights of a complainant, although the complainant might have no remedy at law; and that the Court further erred in omitting to charge the jury, as requested, that complainant's appropriate, peculiar and only remedy, if he ever had or then had any, was in a Court of Equity, and that this being the case of a direct trust, executory in its charac

ter, and cognizable only in equity, the statute of limitations could apply to it only by analogy in its application to legal rights, and that the legal remedy for breach of a covenant or obligation under the hand and seal of the party, would not be barred under twenty years after the right or cause of action accrued.

6th. That the Court erred in omitting to charge the jury, as requested, that the obligation or contract of the said trustee, under his hand and seal, was a covenant, and his failure to perform it was a breach of covenant; that it was the duty of such trustee, at the death of said Mary Emma, to convey to complainant all the interest or property embraced in her marriage settlement, and that the failure of said trustee to do so then or at the death of the life tenant, Peter Guerard, was a breach of trust.

7th. That the Court erred in omitting to charge the jury, as requested, that there can be no disseisin of a trust, and, although a trust may be extinguished by lapse of time, yet a Court of Equity, acting in analogy to the rule of law, will not bar a trust where, if there had been a legal remedy, the statutory bar would not apply at law.

8th. That the Court erred in omitting to charge the jury, as requested, that the confidential relation between trustee and *cestui que trust*, requires the former to give notice to the latter of every act or fact adverse to the interests of the *cestui que trust*; and, especially, where the interests of the trustee and *cestui que trust* conflict.

9th. That the Court was not justified, either by the law applicable to the case, or by the evidence in the cause, in leaving to the jury any question of adverse or hostile possession by the trustee, with respect to the rights of the complainant.

10th. That the decree of the jury is against and contrary to the evidence in the cause.

11th. That the decree of the jury is against and contrary to the weight of evidence in the cause.

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12th. That the decrec of the jury is against and contrary to the law of the case.

Defendant also excepted to that portion of the charge of the presiding Judge, in which he held and charged that, under the marriage settlement of Peter Guerard and Elizabeth Haist, the said Elizabeth had a reversion in fee in the property, transmissible by descent from her, and which vested absolutely in fee in her children living at her death. And that the life estate which her children took, under said marriage settlement, merged in the fee which they took on the death of their mother, in her reversionary interest.

EXHIBIT A.

STATE OF GEORGIA:

This indenture, made this thirtieth day of January, in the year of our Lord one thousand eight hundred and forty, between Mary Emma Guerard, of the first part, Richard W. Adams, of the second part, and Robert G. Guerard, of the third part, all of said parties being of the city of Savannah, in the county of Chatham and State aforesaid.

Whereas a marriage is intended shortly to be had and solemnized between the said Mary Emma Guerard and the said Richard W. Adams: And whereas the said Mary Emma Guerard is entitled to an undivided interest in certain real and personal estate, more particularly in certain real and personal estate designated and specified in a certain deed of marriage settlement or indenture of three parts, made and entered into on the eighteenth day of May, eighteen hundred and five, between Peter Guerard of the first part, and Elizabeth Haist of the second part, (the father and mother of the said Mary Emma Guerard,) and William Parker and Robert G. Guerard, trustees, of the third part, which said indenture is recorded in the office of the Clerk of the Superior Court of the county of Chatham, in Book A. A., folios 452 and 453, and to which reference is hereto made as a part of this indenture; and also in certain personal property and

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slaves designated and specified in a certain deed made by William Parker on the eighth day of June, eighteen hundred and fifteen, to Steele White, trustee, and recorded in the office of the Clerk of the Superior Court of Chatham county, in Book L. L., folios 406 and 407, and to which reference is also hereto made as a part of this indenture: And whereas the said Mary Emma Guerard may hereafter become entitled to or possessed of certain other estate: And whereas, it has been agreed between the respective parties to this indenture, that the said present and future estate shall be settled upon the several uses and trusts hereinafter mentioned and expressed:

Now, this indenture witnesseth, that the said Mary Emma Guerard, for and in consideration of the said intended marriage, and of the sum of five dollars to her in hand paid by the said Robert G. Guerard at and before the sealing and delivery of these presents, the receipt whereof she doth hereby acknowledge, and also for divers other good and valuable considerations her thereunto moving, and by and with the approbation and consent of her said intended husband, Richard W. Adams, (made manifest by his signing and sealing this indenture) she, the said Mary Emma Guerard, hath granted, bargained, sold, enfeoffed, aliened, remised, released, confirmed and delivered, and by these presents doth grant, bargain, sell, enfeoff, alien, remise, release, confirm and deliver unto the said Robert G. Guerard, and to his heirs, executors, administrators, and assigns, all the undivided interest or estate which she, the said Mary Emma, hath in the said real and personal estate mentioned in said indentures and deeds already referred to; and also any other real and personal estate and property, which she may now in any manner possess, and also any other real and personal estate and property, rights or credits, which she may hereafter acquire, be possessed of, or entitled to, during the coverture, in any manner whatsoever, together with all the houses, buildings, liberties, privileges, easements, emoluments, hereditaments,

rights, members and appurtenances whatsoever to the real estate belonging or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits, thereof; and the future issue and increase of the female slaves; and all the estate, right, title, interest, property or possession, claim and demand whatsoever, in law or in equity, of the said Mary Emma Guerard, of, in or to the same, or any part or parcel thereof, with the appurtenances or increase: To have and to hold the said present and future real and personal estate with the future increase of the female slaves, and all and singular other the premises hereby granted, bargained, sold, enfeoffed, aliened and confirmed, with the hereditaments and appurtenances, unto the said Robert G. Guerard, his heirs, executors, administrators and assigns, to the use and behoof of the said Robert G. Guerard, his heirs, executors, and administrators: in trust, nevertheless, to hold the same for the only benefit and behoof of the said Mary Emma, until the said intended marriage shall take place; and from and immediately after the solemnization of the said marriage, then to hold the same for the joint benefit and behoof of the said Mary Emma and Richard W. Adams, during their coverture, (not subject, however, to the debts, contracts or engagements of the said Richard W.) and for the benefit and behoof of the survivor of them, for and during the term of his or her natural life; and from and after the death of the survivor of the said Mary Emma and Richard W., then in further trust to convey the said real and personal estate to the issue of the said marriage, share and share alike, if more than one, his, her or their heirs and assigns, forever, as tenants in common, free from any trust: but if either the said Mary Emma or Richard W. shall die without leaving issue of the said marriage living at the time of such death, then in trust to convey the said real and personal estate to the survivor of the said Mary Emma and Richard W. Adams, her or his heirs and assigns, free from any trust, and for no other use, trust or benefit whatsoever.

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And it is mutually covenanted and agreed by and between the parties to these presents, that it shall and may be lawful for the said Robert G. Guerard, his executors, administrators or successors in the trust, to sell and dispose of any or all of the property and estate herein and hereby conveyed or intended to be conveyed: Provided, always, nevertheless, that the said Richard W. Adams and Mary Emma shall join in the instrument of conveyance, (to signify, conclusively, their assent thereto,) or, if either of them be dead, then the survivor (if the said trust shall continue) shall join in said conveyance; and provided, also, that the proceeds arising from the sale and disposition shall be re-invested and preserved by the said Robert G. Guerard, his executors, administrators or successors in the trust, in the most advantageous manner, upon and subject to the uses and trusts hereinbefore mentioned and expressed; but the purchaser shall not be bound to look to the said re-investment.

In witness whereof, the said parties have hereunto set their hands and seals, at Savannah aforesaid, on the day and year first before mentioned.

MARY EMMA GUERARD, [L. S.]

RICHARD W. ADAMS, [L. S.]

R. G. GUERARD, [L. S.]

Signed, sealed and delivered in presence of

Eliza C. Wayne and W. Parker White.

STATE OF GEORGIA, Chatham County:

Clerks' Office, Superior Court.

Personally appeared William Parker White, a subscribing witness to the foregoing instrument of writing, who, being duly sworn, deposeth and saith that he was present and did see the same duly executed by the parties thereto, for the purposes therein mentioned, and that he signed the same as a subscribing witness to the due execution thereof.

W. PARKER WHITE.

Sworn to before me, this 5th March, 1840.

EDWARD G. WILSON, *Dep. Cpk, S. C. C. C.*

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Recorded 5th March, 1840, in County Records, Book YY. folios, 182, 183, 184.

EXHIBIT B.

STATE OF GEORGIA:

This indenture, made the eighteenth day of May, in the year of our Lord one thousand eight hundred and five, between Peter Guerard, of Savannah, gentleman, of the first part; Elizabeth Haist, of the same place, spinster, of the second part; and William Parker and Robert G. Guerard, the former of Savannah, physician, the latter of South Carolina, planter, of the third part, witnesseth, that in consideration of a marriage intended, by God's permission, to be had and solemnized between the said Peter Guerard and Eliza Haist, and with the view of settling and securing to the said Peter and Eliza, during their lives and to their issue, the property, both real and personal, which the said Eliza Haist is now possessed of and entitled unto within the State of Georgia, and also in consideration of the further sum of three dollars to the said Eliza Haist and Peter Guerard in hand well and truly paid by the said William Parker and Robert G. Guerard, at and before the sealing and delivery of these presents, she the said Eliza Haist, being of full age, and with the advice, consent and approbation of her said intended husband, Peter Guerard, testified by his being a party to and executing these presents, hath granted, bargained, sold, assigned, transferred and conveyed, and by these presents doth grant, bargain, sell, assign, transfer and set over unto the said William Parker and Robert G. Guerard, all that plantation situate at White Bluff, containing two hundred acres, be the same more or less, on Vernon river and known by the name of Wakefield; also all that lot with the buildings thereon in the city of Savannah, known by the number five, Wilmington Tything, Derby ward; also all those seven (7) tracts of land in the counties of Liberty, Glynn, Wilkes and Washington, containing, viz: in Glynn, five tracts of 550, 500,

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200, 185, and 200 acres; in Washington, one tract of 450 pine land; and in Wilkes, one tract of 400 acres oak and hickory land, and one unimproved lot in the town of Sunbury, together with their improvements and appurtenances; and also, all the following negro slaves, viz.: Peter, George, Abraham, Isaac, Jacob, Andrew, Joe, Mooser, Pinder, Lavina, Charlotte, Celia, Sarah, Will and Quash, fifteen in number, and the future issue of the females, with their future issue and increase, and all or any other property the said Eliza Haist may now be entitled to, real or personal, unto the said William Parker, and Robert G. Guerard, their heirs, executors, administrators and assigns forever. In trust, nevertheless, to and for the sole use, benefit and behoof of the said Eliza Haist and Peter Guerard, during their natural lives and the life of the longest liver of them, and from and immediately after the death of the longest liver of them, to and for the sole use, benefit and behoof of all and every the child and children of the said Peter Guerard, upon the body of the said Eliza Haist begotten, share and share alike, if more than one, if but one, then to that one alone, free from any debts or incumbrances, created or to be created, by the said Peter Guerard.

In witness whereof, the said parties have hereunto interchangeably set their hands and seals, at Savannah, the day and year first above written.

ELIZABETH HAIST, [L. S.]

PETER GUERARD, [L. S.]

WILLIAM PARKER, [L. S.]

Sealed and delivered in presence of us, the words "and all or any other property the said Eliza Haist may now be entitled to, real or personal," first interlined in the third line from the bottom of the second page.

GEORGE MILLEN,

RICHARD M. STITES, N. P.

Received of and from the within named William Parker

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and Robert G. Guerard, the sum of three dollars in full of the consideration within specified.

ELIZABETH HAIST.

Witness:

GEO. MILLEN,

R. M. STITES, *Not. Pub.*

Recorded 8th August, 1807, in book A. A. folios 452, 453.

EXHIBIT C.

GEORGIA :

Know all men by these presents, that I, William Parker, of Savannah, in the State of Georgia, aforesaid, for and in consideration of the sum of two thousand nine hundred dollars, to me in hand paid, at or before the sealing and delivery of these presents, by Steele White, of the same place, the receipt whereof is hereby acknowledged, hath bargained, sold and delivered, and by these presents doth bargain, sell and deliver unto the said Steele White, the following negro slaves, to-wit: Diana, Thisbee, Charles, Nancy, Rose, Tom, Maria, Bob and Noke, together with the future issue and increase of the female slaves. To have and to hold the said several negro slaves before named with the future issue and increase of the female slaves unto the said Steele White, his executors, administrators and assigns; in trust, nevertheless, to and for the only use, benefit and behoof of Mrs. Elizabeth Guerard, the wife of Peter Guerard, of Savannah, for and during the term of her natural life, and if she survive the said Peter Guerard, then from and immediately after her death to the child or children which she may leave by the said Peter Guerard, to them, their executors, administrators and assigns, as tenants in common. And if the said Peter Guerard should survive the said Elizabeth Guerard, then from and immediately after the death of the said Elizabeth Guerard, to and for the only use, benefit and behoof of the said Peter Guerard for and during the term of his natural life, and then from and after the death of the said Peter Gue-

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rard, to and for the only use, benefit and behoof of the child or children of the said Peter Guerard as tenants in common, to them, their executors, administrators and assigns; and in the event of the said Peter Guerard dying without child or children living at his death, then to the right heirs of the said Peter Guerard, or to such person as he by his last will and testament may dispose of the said negroes, subject to the life estate of the said Elizabeth Guerard.

In witness whereof, the said parties have hereunto set their hands and seals, this eighth day of June, one thousand eight hundred and fifteen.

WM. PARKER, [L. S.]

STEELE WHITE, [L. S.]

Sealed and delivered in the presence of

WILLIAM DAVIES, N. P.

Recorded 19th October, 1852, in book LL, folios 406, 407.

HARDEN; and WILLIAMS, for plaintiff in error.

LAW, BARTOW & LOVEL; and JACKSON, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] The marriage settlement of 1805, between Elizabeth Haist and Peter Guerard, conveyed the entire legal estate in the real and personal property, to Dr. Parker, the trustee, and then declared a trust in favor of the husband and wife during the life of the longest liver of them, with remainder to their children, without using words either expressly confining the remainder to a life estate in the children, or expressly declaring it to be an estate of inheritance in them. It was contended that this settlement having been executed before our statute of 1821, making all estates, estates in fee unless some less estate be expressly limited, and using no words of inheritance, declared a trust in favor of the children for their lives only, leaving the equitable estate which would remain

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after their death, as a *resulting trust* to the original owner, Elizabeth Haist, or to her husband, by virtue of his marital rights. It is useless to consider the effect of the settlement by itself, for we think the resulting trust is completely rebutted by the deed of 1819, between the same parties. In 1819, the very same parties bought other property and took a deed, which professes to declare the very same trusts as the marriage settlement, and in doing so, declares a trust in favor of the husband and wife during the life of the longest liver of them, with remainder to the children and "their heirs"—pursuing the intent of the marriage settlement, but using new language which shows that intent to have been, that the equitable fee should vest in the children, leaving nothing to result to anybody. It was abundantly shown on one side in this argument, and not disputed on the other, that a resulting trust may be rebutted even by *parol* declarations of the person in whose favor it would otherwise be raised; and it is effectually rebutted in this case by the deed of 1819. The equitable fee went to the children, and in 1820, when the wife died, her estate no longer needing a trustee to preserve it from the marital rights of her husband, the whole object of the trust was accomplished, and the trust itself, therefore, terminated, and the children from that time stood clothed with the legal and equitable fee in remainder, subject to the life estate of the husband, who was then living. One-third of this vested legal remainder belonged to Mary Emma Guerard, one of the three children, and passed under her marriage settlement with Mr. Adams. Under the terms of that settlement, when Mrs. Adams died in 1840, leaving no issue, Mr. Adams was entitled to the whole of her share in remainder, and on the death of the life-tenant, Mr. Peter Guerard, in 1843, was entitled to it in possession also.

[2.] Such being our opinion of Mr. Adams's right, we are yet constrained to hold that it has been barred by the statute of limitations. It was suggested that the statute could not bar him if, as some of the evidence seemed to indicate, Mr.

Robert Guerard held the property after the death of Mr. Peter Guerard, not as his own, but as the property of the Guerard estate. The only true question as to the manner of his holding, was as to its being *adverse to Mr. Adams*. The possession of a person holding under another, is adverse to everybody but that other under whom he holds. There was no pretence that the holding was under Mr. Adams, and it was therefore adverse to him. It was also suggested that Mr. Adams could not be barred, because he was mistaken as to the legal effect of the facts. It was said that equity will relieve from a mistake of law as well as from a mistake of fact, and that the statute does not begin to run till the discovery of the mistake. It is too late to deny in this Court, that there are mistakes of law as well as mistakes of fact, which will be relieved in equity; but I apprehend relief was never granted from such a mistake as this. Those mistakes from which relief has been granted, were mistakes which occurred in doing something, not in doing nothing; they were mistakes of action, not of mere inaction. When one has contracted or acted on a false assumption of fact or of law, equity may relieve him from the effects of the action, and will not begin to count time against him until the discovery of the mistake; but where he has simply lain still, under a mistaken assumption of either fact or law, without having ever acted at all, it is not a question when time will begin to be counted against his relief, but it is a case where no relief will be granted at any time from the effects of his inaction. One of these effects of inaction, is the loss of his right by the statute of limitations. The truth is, that the Courts of Equity, in administering relief from fraud and mistake, a class of relief which, in its original at least was peculiar to them, and to which there is no statutory bar, have adopted a bar of their own, and in fixing it, have proceeded on a different principle from the statutes of limitation. The statutes in cases where they are applicable, count

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time from the beginning of the cause of action, and in such cases, Courts of Equity apply the statutes in their actual terms, but in cases of relief from fraud and mistake there is no statute of limitation applicable to the class of cases, and Courts of Equity, in adopting a bar for that class of cases, count time, not from the perpetration of the fraud or the occurrence of the mistake, (when the cause of action for relief begins,) but from the discovery of the fraud or mistake. But still the question remains, whether it is such a mistake as will put a Court of Equity in motion. When once in motion, it will relieve and will count time only from the discovery of the mistake; but it is only a mistake on which there has been action, that will put it in motion. Mere inaction, in a case where the statute makes it a bar, is a bar in equity, as well as at common law. I apprehend there is no case, certainly no case was produced in this argument, where a Court of Equity has relieved a party from the operation of the statute, where the bar had attached, before the case was brought in some shape, into a Court of common law or the Court of Equity. Courts of Equity do not hesitate to protect a right which has become barred by the statute of limitations during the pendency of the same subject-matter in the Court of Equity, but to relieve from the bar where it has attached before the matter is introduced into either Court, would be to set the statute aside. But it was further said, that the statutory period applicable to this case, is twenty years, and not seven and four years. The marriage settlement between Mr. Adams and his wife, directs the trustee, in the contingency which happened, to convey the estate to Mr. Adams at the death of his wife, and it was contended that the trustee by signing as a party, promised to make that conveyance, and so, was under an obligation under seal, to do so. We think there was no need for a conveyance from the trustee to Mr. Adams; that the marriage settlement itself operated as a conveyance; and that there being nothing needful to be done by a trustee, there was *nothing* to be



done, and that the office of trustee was ended by the death of Mrs. Adams. We think that the marriage settlement itself, operating as a conveyance to Mr. Adams, has every effect which could possibly be produced by the conveyance which it directs the trustee to make, and that there was therefore no need for the conveyance by the trustee. The case of *Edmondson vs. Dyson*, 2 *Ga. Rep.* page 307, was cited as authority, to show that wherever there is a direction in one conveyance that the trustee named in it, shall make another conveyance, he must do so, and that his office of trustee will continue until he does so, whether the second conveyance will or not produce any different effect from what would be produced by the original conveyance, operating itself as the conveyance which it directs. The decision is very far from going to such an extent, nor has any decision gone so far. The case was a devise to Dyson in trust, to hold for Rakestraw during his life, and then to convey to Rakestraw's heirs at law in fee. The question was whether the rule in Shelley's case applied, uniting both estates in Rakestraw, or whether the heirs at law should take the estate expressed for them, as purchasers. The rule in Shelley's case does not allow the ancestor to take a life estate, and his heirs at law to take a remainder in fee by the *same instrument*, but does not prohibit the ancestor from taking a life estate from one instrument, while the heirs at law take the remainder in fee, from *another instrument*. Where the same instrument conveys both the estates, the rule unites them both in the first taker, but where one instrument conveys one estate and another instrument conveys the other, the rule produces no such union, but leaves the ancestor and the heirs to take, each the estate which is expressed for him by the instrument in his own favor. The Court held, that the trustee should execute the conveyance in that case, in favor of the heirs at law, because the heirs could claim under that conveyance, if made as directed, and *defeat the rule*, while if they were left to claim under the will, they and their ancestor would be

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claimant's under the same instrument, and the rule would apply and cut them off from the estate expressed for them in the will. The conveyance in that case was certainly thought by the Court to have a very important *effect, different* from the effect of leaving the heirs to claim under the will; and it was *for* its effect, that the Court ordered the trustee to execute it. If the Court had thought that the will, operating as a conveyance to the heirs, would have produced the *same effect* as the conveyance, which the will directed to be made in their favor, the conveyance would not have been ordered, for that would have been to order a thing *useless* and of no effect. Chancery dispenses with useless things, and terminates the office of the trustee the moment that *nothing* of effect remains for him to do, and leaves the use to be executed by the statute of uses, uniting the legal title and the use together. The Courts of Equity never interfere with the execution of the use by the statute, unless, or any longer than, there is something for the trustee to do, which being done, will produce a different result from the statute. If A. should convey to B., in trust that B. should convey the same title to C., in trust that C. should convey the same title to D., and so on to Y., in trust that Y. should convey the same to Z., here the first conveyance would raise a use in favor of Z., and equity would leave the statute to execute it at once, by uniting the legal title with it. If all the intermediate conveyances should be made as directed, they would produce at last the precise *result*, which would be produced by the statute without them. Equity therefore simply leaves the statute to do its work, and dispenses with the intermediate conveyances, thus arriving at the *same end* by a nearer road. So in Mr. Adams's case, the marriage settlement did not in terms, convey to him at the death of his wife without issue, but by directing a conveyance to him in that event, it raised a use in his favor, and the effect to him was precisely the *same*, whether the trustee retired from the same at her death, leaving the statute to execute the use by clothing him with the legal

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title as well as the use, or the trustee, executed the conveyance which would have done only the same thing. Therefore, the marriage settlement itself operated as a conveyance to him, the moment his wife died, the trustee then retired forever from the scene, and Mr. Adams stood clothed with the legal and beneficial interest by operation of law. His estate was one in remainder, but his right of action to reduce it into possession arose as soon as the life tenant died in 1843, and the Guerards took adverse possession. Not having asserted his right in the personalty within four years, nor in the realty within seven years, we think his right in all is barred by the statute of limitations. The statute being conclusive in the case without regard to the original right, the judgment is affirmed.

Judgment affirmed.

ISAAC MOYE, et al., plaintiffs in error, vs. JOHN KITTRELL,
administrator, defendant in error.

An instrument conveying property *in presenti*, and having all the requisites of a deed, and delivered by the maker to the Clerk to be recorded as such, is not testamentary in its character, notwithstanding it declares, that the property is not to go into the possession of the donees till the death of the donor; especially as the paper, would be ineffectual as a will, being attested by two witnesses only.

Trover, from Washington county. Tried before his Honor, W. W. HOLT, at March Term, 1859.

This was an action of trover, by John Kittrell, as administrator of Noah Kittrell, deceased, against Isaac Moye, and

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others, for certain negroes and other things, alleged to be the property of said deceased, at the time of his death.

At the trial, plaintiff offered in evidence his letters of administration, proved that the property in controversy was in the possession of said Noah at the time of his death, and that it had subsequently been converted by defendants, who had it in possession at the commencement of the suit.

The defendants claimed the property under the following instrument, executed by the said Noah Kittrell in his lifetime, and which they offered in evidence in support of their title, viz:

"To all whom it may concern: Know ye, that I, Noah Kittrell, senior, of the county of Washington, and State of Georgia, in consequence of the love, good will and affection which I have, and do bear towards my daughters of the said county, and State aforesaid, do by these presents, freely give and grant unto my four daughters, viz: Sarah Forbs, Nicey Kittrell, Nancy Kittrell, and Rachel Brantly, their heirs, executors and administrators, all and singular my whole estate that I now possess, consisting of my negro woman Hetty, negro boy Benjamin, negro girl Phillis, negro boy Peter, and stock of all kinds, consisting of horses, cattle and hogs, tools of all descriptions, household and kitchen furniture, with the exception of my bed and furniture, which I give to my daughters, Nicey and Nancy, to be equally divided between them. I also, give my grand-daughter Ellen J. Massey, fifty dollars in cash; said property to go into the possession of said heirs at my death. Signed by my own hand before proper witnesses, and bearing date the 3d day of February, 1853. To have and to hold all the said named property to them, the said Sarah Forbs, Nicey Kittrell, Nancy Kittrell, Rachel Brantly, and Ellen J. Massey, their heirs, executors, administrators, assigns, absolutely, without any manner of condition whatever.

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In witness whereof, I have hereunto set my hand and seal,
this third day of February, 1853.

(Signed,) NOAH KITTRELL, [L. S.]

Signed, sealed and declared in presence of us,

ISAAC MOYE,

JOHN IVEY, J. P."

This paper had been duly recorded in the office of the Clerk of the Superior Court of Washington county, 14th February, 1853.

To the introduction of this paper in the evidence, counsel for plaintiff objected on the ground that it was a testamentary paper and should first be established and admitted to probate as a will, in the Court of Ordinary, before it could be received in evidence here.

The presiding Judge, after argument, sustained the objection and rejected the paper, holding, that it was a will, and as such, not admissible in evidence, until it was first admitted to record and probate in the Court of Ordinary.

To which ruling and decision, counsel for defendants excepted.

J. S. HOOK, for plaintiffs in error.

W. S. ROCKWELL, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The only question we find it necessary to decide in this case is, whether the paper offered by the defendants as evidence of their title for the property sued for, is a will or a deed?

By it the intestate of the plaintiff declares that he freely gave and granted to the defendants, all of the property which he then possessed, with the exception of his bed and furniture, which he gave to two of his daughters, and fifty dollars

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in cash to a grand-daughter, "to go into their possession at his death." To have and to hold absolutely, without any manner of condition whatever.

The instrument was attested by two witnesses, one of them being a justice of the peace, and was recorded eleven days after its execution, being handed to the Clerk by Noah Kittrell, senior, the maker; and this has been held repeatedly to be tantamount to a delivery to the party himself.

The form of the instrument is that of a deed. And the form is evidence of the intention of the maker. But independent of this, and of the outside testimony, which was rejected by the Court, by putting it upon record, the maker manifested his purpose to part with the title to the property, and to make the paper irrevocable. The only reservation is, that the property was not to go into the possession of the donees till the death of the donor. It has been decided more than once by this Court, that it was competent for the donor to reserve a *life estate*, in the property conveyed, without making the paper testamentary. A reservation of the possession merely, is not equal to a life estate.

If the words were doubtful, we should incline to that construction, which would support the instrument. And this can be done only by holding it to be a deed. For as a will, it must fail, wanting the necessary attestation.

But we are not under the necessity of resorting to this principle. This is a stronger case than many which have been adjudged by this Court to be deeds.

We are constrained therefore to reverse the judgment of the Circuit Court.

Judgment reversed.

**JAMES M. C. PANNELL, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.**

- [1.] Upon an application for continuance by the accused, although the Court determines the showing a good one, yet if counsel for the State admit in writing the facts expected to be proved by the absent witnesses before the case is actually continued, it is no error for the Court then, to refuse to continue the case, and proceed with the trial.
- [2.] When the jury have been selected to try the cause, and four of them sworn, and one of the remaining jurors excused by the Court for sickness, it is not error in the Court, after causing the panel to be filled, to require the list again to be stricken over, and the cause to proceed.
- [3.] It is not necessary or proper to declare a mistrial on account of the sickness and excuse of one of the selected jurors, unless the jury have been previously charged with the case.
- [4.] To entitle a party to the benefit of a written admission of what an absent witness would prove, were he present, it must be put in evidence, and read to the jury, by the party claiming the benefit of it.
- [5.] The presumptions arising against an accused, from the fact, that a negro was seen to go into his store house after nine o'clock at night, and before day break in the morning, with an empty bottle, and coming out directly after, with the bottle filled with whiskey, cannot be rebutted by the fact that the owner knew that the negro was in and permitted it; or that the overseer was present, saw him enter and permitted him to do so; or from the fact that the wife of the accused, and perhaps a boy, were in the house with the accused at the time.

**Indictment, in Burke Superior Court. Tried before Judge
HOLT, at May Term, 1859.**

The plaintiff in error was indicted for furnishing liquor to a slave contrary to law. The State having announced ready for trial, the defendant moved for a continuance, on account of the absence of two witnesses. This motion was supported by the affidavit of defendant, as to what he expected to prove by the absent witnesses, &c. The Court ruled the showing sufficient cause for a continuance. Whereupon, the counsel for the State made and submitted an admission in writing, of the fact proposed to be proved by the absent witnesses, viz: That "on the day before and the day after the al-

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leged offence, defendant had no liquor of any kind in his store," and upon this admission, moved for and insisted upon a trial of the case. Defendant objected on the ground that the admission was not sufficient to force him to a trial, and that the Act relating to such admissions, does not apply to criminal cases. The Court overruled the objection and ruled the defendant to trial; to which decision he excepted.

After the jury was stricken and four of them sworn, one of the jurors selected, informed the Court that he was too sick to try the case; whereupon he was discharged, and counsel were asked by the Court if they could not agree upon another juror. Counsel for defendant proposed to substitute one who had been stricken by the State, which proposition the Attorney General declined. Defendant's counsel then moved that the Court should declare a mistrial, which the Court refused to do, but required counsel to strike a jury from the same panel; another name being added thereto in lieu of the juror who was sick. To which rulings and decisions counsel for the defendant excepted.

In the progress of the trial, the presiding Judge held that the defendant was not entitled to the benefit of said admission, unless he offered it as evidence in his behalf, and thereby thus depriving defendant of the conclusion. To which decision defendant excepted.

The evidence on the part of the State was, that the slave went into defendant's shop or store-house, between nine o'clock at night and day-break, and that he went in with an empty bottle and came out with it filled with whiskey. The defendant, and his wife, and *perhaps*, a boy, were in the house at the time. That the slave went in and obtained the liquor with the knowledge of his owner and overseer, of his intention so to do, and that the overseer was present and permitted him to go in for that purpose. Upon this evidence, the Court charged the jury, that the presumption arising from the slave being in the store at the time of night, was

against the defendant, and that presumption could not be rebutted, unless it appeared that the slave was sent by his owner, overseer or employer, and the knowledge and consent of the owner and overseer did not remove said presumption. To which charge defendant excepted.

MILLERS & JACKSON, for plaintiff in error.

Attorney General, *contra*.

By the Court.—LYON J. delivering the opinion.

[1.] The object of the continuance was, to procure the testimony of the absent witnesses. The Attorney General having admitted in writing, what the prisoner expected to prove by the absent witnesses, such continuance ceased to be necessary, and the Court was right in refusing to let the case be continued, although previous to the admission, he thought the showing good; the record not disclosing the fact, that the case had already been continued; and, if it had, we do not know that such fact would make any difference, unless the action of the Court had in some way operated to the surprise or injury of the defendant.

[2.] After one of the selected jurors had been excused on account of sickness, it was not irregular in the Court to cause the excused juror's place to be supplied, the list stricken over, and the trial to proceed.

[3.] Neither should the Court have ordered a mistrial under the circumstances, as the jury had not been charged with the cause.

[4.] If the plaintiff in error attached any importance to the facts expected to be proved by the absent witnesses, as admitted in writing by the Attorney General, he should have introduced and read the admission to the jury as evidence of those facts; that admission stood in place of the witnesses. It was his right to use it, and as evidence. Having failed

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to do so, the facts contained therein were not before the jury, and they could not entertain them. Hence the defendant was not entitled to its benefits, for the sole reason that he did not put it in evidence.

[5.] The evidence on the trial having disclosed the fact, that the slave went into defendant's shop, or store-house, after nine o'clock at night, and before daybreak in the morning, with an empty bottle, and came out with the same filled with whiskey, the presumption of the guilt of the accused, arising from these facts, could not be rebutted by the facts, that the slave's owner knew that the negro was going there for that purpose, and permitted him to do so; or that the overseer of the negro was present, saw the negro enter and permitted him to do so; nor that the wife of the prisoner, and perhaps, a boy, were in the house with the accused at the time, unless the negro was sent by the owner or overseer for the whiskey; so there was no error in the charge of the Court.

Judgment affirmed.

JOHN JAMES, plaintiff in error, vs. DIXON KERBY, defendant in error.

- [1.] The contents of a judgment or decree, rendered in the Courts of another State, cannot be proven by parol.
- [2.] Testimony will be rejected, unless its relevancy is made to appear.
- [3.] The sayings of the former owner are inadmissible to prejudice the title conveyed, if made subsequent to the time when the title and property are parted with.

Trover, in Richmond Superior Court. Tried before Judge Holt, at October Term, 1859.

This was an action of trover, brought by Dixon Kerby, against John James, for the recovery of a negro man slave, named Valentine.

In the progress of the trial, the defendant, amongst other things, in support of his title, relied upon and introduced in evidence, a bill of sale for said slave to him by Mary Matilda Langston, dated 11th January, 1854. Plaintiff in reply to this evidence, proposed to prove the sayings and declarations of said Mary Matilda, as to the consideration of said bill of sale; said declarations made after the date of the bill of sale. To the introduction of this evidence, defendant objected. The Court overruled the objection and received the evidence, and counsel for defendant excepted. The proof upon this point was, that said Mary Matilda had said that there was no consideration for the bill of sale executed by her to defendant, but that the understanding between her and defendant, was, that he should defend the title to the slave, and if successful, they were to share or divide equally said slave or his value.

In the further progress of the cause, plaintiff offered to prove that certain notes made by him to John Kerby, deceased, had been sued for in a Court of Equity, in the State of South Carolina, in the name of one Simon Ward, and a decree rendered in said equity suit, ordering said notes to be delivered up to the representatives of John Kerby, deceased. To the introduction of this testimony, counsel for defendant objected, on the ground, that the judgments and decrees of the Courts of another State, could not be proved, or given in evidence in this way; and further, because said testimony was irrelevant. The presiding Judge overruled the objection, and admitted the testimony, and counsel for defendant excepted.

The jury found for the plaintiff. Whereupon, counsel for defendant tendered their bill of exceptions, assigning as error the rulings and decisions above excepted to.

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MILLERS & JACKSON; J. C. & C. SNEAD, for plaintiff in error.

ED. J. WALKER, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Was the testimony of James McNair admissible?

It was offered and allowed, to prove that certain notes, made by the plaintiff to John Kerby, deceased, had been sued for in South Carolina, in the name of Simon Ward, and had been decreed to be delivered up to the representatives of the said John Kerby.

Parol evidence cannot be received to prove the contents of a record in a judicial proceeding. This can only be done by an exemplification properly certified. Besides, there is no testimony in the bill of exceptions, connecting the proof tendered with the case tried. And hence, for anything which appears before us, it is clearly objectionable, on the ground of irrelevancy.

The sayings of Mary Matilda Langston, the vendor of the defendant, were permitted to go to the jury, after she parted with the title to the negro in dispute, to the effect, that *James*, the defendant, paid nothing for the slave; and that this was a speculative lawsuit, in which, if successful, she was to share the profits.

We have repeatedly held, that the declarations of a party, after parting with the property, are inadmissible to prejudice the title of one claiming under the declarant.

Judgment reversed.

CLAYTON & KENNADY, plaintiffs in error, vs. FRANCIS O'CONNER, defendant in error.

Where one person sells a note to another, representing it to be good, and knowing it to be worthless, the purchaser, when he discovers the fraud, may rescind the trade by tendering back the note, and after doing so, is no longer responsible for the use of proper means to collect the note.

Case, in Richmond Superior Court. Decision by Judge HOLT, at October Term, 1859.

This was an action on the case, brought by Clayton & Kennady against Francis O'Conner, for falsely and fraudulently negotiating and selling, for value received, to plaintiffs, a promissory note on one John C. Carmichael, and representing that said Carmichael was solvent, and able to pay said note, which representation was false—the said Carmichael, at the time of said transfer, being insolvent, and utterly unable to pay said note, and which fact was well known to defendant at the time.

The following is a copy of the note negotiated:

“AUGUSTA, Georgia, Oct. 8th, 1856.

\$800. Ninety days after date, I promise to pay to the order of D. T. Smith, eight hundred dollars, at either bank in this city, for value received.

(Signed)

JOHN C. CARMICHAEL.

Endorsed in blank, “D. T. SMITH.”

Evidence for Plaintiffs.

A. W. Walton testified: That he lives with plaintiffs as book-keeper. On the 4th December, 1856, defendant came into plaintiffs' store between 12 o'clock, M., and 2 o'clock, P. M., and offered to sell them a note on John C. Carmichael, and payable to the order of one D. T. Smith, and endorsed by Smith in blank, for \$800 00; said note dated 8 Oct., 1856, and payable ninety days after date. After some conversa-

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tion John J. Clayton, one of the plaintiffs, told witness to draw a check on the Mechanics Bank for \$762 50. Clayton told defendant to endorse the note; defendant said that his name would make the note no better; that Carmichael was as good as any man in the city of Augusta, and would pay the note at maturity. Defendant took the check and left the store; witness and plaintiff learned a very short time afterwards, on the same day, that Carmichael had failed; defendant lives in South Carolina; plaintiffs sent to the bridge and elsewhere to intercept defendant before he got over the river, but did not find him; the check was paid by the Mechanics Bank; two or three days afterwards plaintiffs sent witness over to see defendant, who resides seven or eight miles in the country, to return him the note, or get his endorsement on it, or the money; witness offered to return the note to defendant and take back the money, or for defendant to endorse the note, but he would do neither; told defendant that Carmichael had failed when he passed the note to plaintiffs, and that it was worthless; defendant said he did not make child's bargains.

Cross-Examined.—The note was turned over to L. D. Lallerstedt, Esq., to be put in suit, and was in his hands at its maturity; witness did not call on Carmichael for payment; don't know whether he ever was called on; Carmichael failed two or three days before defendant sold the note to plaintiffs, but his failure was not generally known; witness nor plaintiffs did not know it until an hour or two after the trade; considers the note worthless; neither Smith, the endorser, nor Carmichael, responsible or solvent; Carmichael was in good credit up to the date of his failure, and did a large business; plaintiffs had dealt in paper with his endorsement, at a discount, before; had some on hand at that time, but it was subsequently arranged by the makers; witness heard John C. Kennady say he met defendant in the street that day before the trade was made.

Charles J. Goodwin testified: That he was a clerk in the

store of Lallerstedt & Deming; on the 4th day of December, 1856. On the morning of that day defendant, Francis O'Conner, came into said store and walked to the back where Mr. Lallerstedt was sitting, and offered to sell him a note on John C. Carmichael for eight hundred dollars; Mr. Lallerstedt told him that Carmichael had failed, and the note was worthless; after some conversation between them defendant left.

Lawrence D. Lallerstedt testified: That Francis O'Conner, the defendant, came into his store on the morning of the 4th day of December, 1856, and offered to sell him a note on John C. Carmichael, the note just put in evidence; witness told defendant, Carmichael had failed, and the note was worthless; defendant left and went down the street.

Cross-Examined.—Plaintiffs' counsel objected to the statement of any fact, or the answer to any question, the knowledge of which fact or answer was obtained by witness during the time, or by reason of the relation of client and attorney; which objection was overruled by the Court, and witness, the attorney in the case, required to answer the questions that elicited the following testimony, to all of which plaintiffs' counsel excepted: This note was placed in the hands of witness for collection, by Clayton & Kennady, some time subsequent to the day just mentioned; witness heard of the failure of John C. Carmichael two or three days before the defendant offered the note to him, on the 4th; his failure was not generally known; witness was a director in a bank, and had good opportunities for knowing the fact; witness knows of no payment made by Carmichael since his failure; he was in good credit previous to that time; did not present the note to Carmichael for payment; the note was due about the 9th of January afterwards. D. T. Smith was held to bail and attachments issued, and garnishments served on several persons, under the statute provided for such proceedings before the debt is due, where the debtor is about to leave the

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State.* The Court, upon the trial, nonsuited the plaintiffs, upon the ground that D. T. Smith, as endorser, could not be sued in such an action; that he was not liable as endorser until the note matured, was put in bank, and regularly protested for non-payment. There was no property found upon which to levy the attachment, the garnishees answering that they had nothing in their hands belonging to D. T. Smith; Smith had a drug store in the city, and made a fine appearance of stock; little capital makes a large show in the drug business; witness called on Smith at his store about the last of December, (there was an auction there that day,) to get him to make some arrangements about the payment of the note; he declined doing any thing with it; witness knows of no debts paid by Smith before or since, except a horse that was taken back which had been sold to him; witness considered Smith worthless; Smith left for parts unknown about ten days before the maturity of the said note, and has not been here since; has no knowledge of his whereabouts; witness looked for Smith the day the note became due; found out then he had been gone about ten days; the note was not put in bank.

Plaintiffs proposed to show by the records of the Court, that Carmichael had taken the benefit of the honest debtors' Act. Defendant objected. The Court sustained the objection, and counsel for plaintiff excepted.

Plaintiffs here closed; and defendant moved for a nonsuit on the grounds:

1st. That the note of Carmichael never having been presented, there was no legal evidence or proof that it was valueless, or would not have been paid by him, if duly presented at maturity, or by Smith, the endorser, on due notice of non-payment by the maker.

*COMMENT BY JUDGE HOLT.—The witness is not correct in his recollection of the decisions of the Court in that case. The plaintiffs were compelled to take a nonsuit for want of evidence. The Court required, before it would admit the note in evidence, proof of demand for payment of the maker, and notice of refusal to the endorser, which proof could not be made.

2d. That plaintiffs have, by their neglect, discharged the endorser from all liability.

The presiding Judge, after argument, granted a nonsuit, and counsel for plaintiffs excepted, and assigns as error said decision.

L. D. LALLERSTEDT, for plaintiffs in error.

H. H. CUMMING; and JNO. B. CUMMING, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

This was an action for deceit, in the sale of a note to the plaintiffs by the defendant. The evidence was that the defendant traded the note to the plaintiffs, representing it to be perfectly good, just after he had been informed that it was worthless; that the plaintiffs, when they discovered the worthlessness of the note, within a few days, tendered it back to the defendant, and demanded a return of the money they had paid for it; and that the defendant refused to rescind the contract, not denying the worthlessness of the note when asserted to him by plaintiffs' agent, who tendered back the note to him, but simply saying that he did not make child's bargains. The Judge nonsuited the plaintiffs, upon the ground that they had not used the legal steps to collect the note. This ground rests, we think, upon an erroneous conception of the plaintiffs' rights and remedy. If the facts stated in evidence were *true*, the plaintiffs had a right to *rescind* the contract, without the consent of the defendant, on account of his fraud, and tendering the note back to him was the proper step to rescind it. After that, the contract was rescinded, and the money they had paid for the note belonged to the plaintiffs, and the *note belonged to the defendant*; and the plaintiffs were not bound to take legal steps to collect it, nor to do any thing at all with it. The defendant had no right to require them to look after or take care of his property, after he had it tendered to him. His refusal to accept

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it did not affect their rights in the least, for they had a right to rescind without his consent. The Judge may have acted upon the idea that the legal steps for collecting the note were the only test of the goodness of the note at the time when it was traded, and that the plaintiffs having failed on that point, had failed to show, in the only possible mode of showing, the main fact on which their whole case rested—the fact that the note was not good when traded. Counsel declined to take this ground in the argument, but it may be as well to show that it is not maintainable. This ground assumes that a representation that a note is good, is equivalent to a warranty that it can be collected by the use of legal means. The assumption is not true. The debtor might be in possession of a large estate, be in full credit and free from all other debts at the time when the representation is made, and the representation therefore be perfectly true, and yet he might squander every thing at the gaming table or otherwise, before judgment could be obtained, or even before the maturity of the note. And so, while the representation might be perfectly true, it might turn out that the use of all legal means would prove inadequate to the collection of the note. So the reverse of this might happen. The representation might be false when made, and yet from unforeseen good luck, the debtor might subsequently acquire means and actually pay the note. The use of legal means to collect the note, therefore, so far from being the only test of the truth of the representation at the time when it was made, is no certain test at all. And this is so on one of the principles which led the Judge to rule out the plaintiffs' evidence of a judgment of insolvency, to show the fact of an insolvency at some time *before* the judgment. His Honor correctly held, that the judgment showed only an insolvency, when the proceedings to obtain it were instituted, and not a *previous* insolvency at the time of the trade. So the use of the legal means to collect the note, and their failure to accomplish the collection, would have shown that the note was not good at

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the end of the legal process, but would not have shown but what the debtor might have had ample means and credit, and so the note have been good, according to the universal understanding of the term, at the time when it was represented to be good. The value of paper can not be subjected to any such perfect test. Commercial paper is a marketable commodity, and its value is to be fixed, like that of other marketable commodities, by facts and circumstances, and also by the judgments of witnesses. The market value of a thing, is what it will bring in the market, and this can be proven only by the judgments of witnesses. It was contended in the argument, that the defendant's representation that the note was good, could not be legally fraudulent, though false in fact, because it was a representation concerning the solvency of the debtor—a subject, it was said, equally open to the knowledge of both parties. Where the subject of the representation is open to *inspection*, it is equally open to the knowledge of both parties, and in that case, each party must rely on his own inspection, and not on representations of the other. But solvency is not an object of inspection, and a knowledge of it is to be acquired not by inspection, but in large measure, by human testimony. The plaintiffs could have ascertained the solvency of the debtor, not by inspecting him nor by inspecting his possessions, but by inquiry, and the answers of persons who knew his affairs or knew his commercial standing in the market. And they never could have ascertained it, if all the persons to whom they might have applied, had done as the defendant did, if the evidence be true—that is, if they had all represented the note to be good when they knew it to be bad. The defendant spoke on the point which could be settled only by human testimony, and the plaintiffs surely had as much right to expect and require truth from the man who was receiving their money for it, as from the disinterested multitude in the streets. The plaintiffs, by their evidence, showed the trade, showed the representation, showed it to have been false, and that its false-

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hood was known to the defendant when he made it. This was not a case for a nonsuit, but a case for recovery, unless the defendant had broken down the force of this evidence.

Judgment reversed.

THOMAS WYNNE and WIFE, plaintiffs in error, vs. JAMES H. ALFORD, executor, defendant in error.

When enough appears upon the face of a bill, to suggest to the Court that the complainant is entitled to relief, provided the proper allegations were made, leave will be granted for that purpose.

In Equity, from Richmond county. Decision on demurrer, by Judge HOLT, July, 1859.

This was a bill filed by Thomas Wynne and Cecelia, his wife, by her next friend, against James H. Alford, executor of Guilford Alford, deceased.

The bill alleges, that Thomas Wynne, one of the complainants, being indebted to the said Guilford Alford, in his lifetime, the sum of \$1,500 00, executed to him a mortgage on three negroes, to-wit: Amanda, Alfred and Rachel, to secure the payment of said debt—the slaves being worth \$2,500 00. That the debt not being paid at maturity, the said Guilford foreclosed said mortgage, and levied his mortgage *fi. fa.* upon said slaves. That the said Guilford promised the said Cecelia, that upon the sale of said negroes, he would become the purchaser, and upon realizing upon a resale of Alfred and Rachel, a sum sufficient to pay off and satisfy his debt, he would make a trust settlement of Amanda

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and her issue, on said Cecelia, to her sole and separate use for life, remainder to her children.

The bill further alleges, that the said slaves were sold for \$2,125 00, they being worth \$2,500 00, and that Alfred and Rachel were worth, and should have been sold for, an amount sufficient to satisfy the said indebtedness and interest. That Amanda was sent by said Guilford, after said sale, back to said Cecelia, where she has remained ever since, and has had two children. That the said Guilford, in his lifetime, and the said defendant, his executor, since his death, refused and neglected to make said settlement upon complainant and her children, and the defendant has instituted his action of trover, for the recovery of the slave Amanda and one of her children. The bill prays that the action at law be enjoined, &c.

To this bill defendant demurred, and for cause of demurrer, assigned—

1st. That there was no equity in the bill, and that under its allegations, complainants were not entitled to relief.

2d. For want of consideration for the alleged promise and agreement.

3d. That said agreement, as set up in the bill, is void under the statute of frauds.

The Court sustained the demurrer, and dismissed complainants' bill. To which decision counsel for complainants excepted.

WM. GIBSON; and J. C. & C. SNEAD, for plaintiffs in error.

MILLERS & JACKSON, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

As the bill in this case stands, it is defective in two particulars.

It fails to charge distinctly that there was a contract between the parties to the effect, that Alford should buy in the

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three negroes, under his mortgage foreclosure, and after crediting the execution with the value of two of them, to-wit: Alfred and Rachel, and payment should be made to him of the balance of his debt by Wynne and wife, he would settle upon Mrs. Wynne, to her separate use for life, with remainder to her children, the girl Amanda. And that Wynne, the husband, was a party to the contract.

We affirm, therefore, the judgment of the Court below, with leave to the complainants to amend the bill, as suggested, provided they can do so.

Judgment affirmed.

ELTON HODGES, trustee, complainant, plaintiff in error, vs.
ASHLEY HOLIDAY et al., defendants in error.

[1.] The parties being at issue on a claim case, agreed to, and did submit to the Court, the questions of law arising out of the will and codicil of D. W., as to the interest of D. G. W., under the same, and whether such interest be subject to executions against said D. G. W. The Court having decided such interest to be subject—

Held, That the claimant was concluded by such decision only as to the question submitted.

[2.] When a claim is interposed and returned to the Court for trial, the proper disposition of it is by a verdict of the jury, unless withdrawn or dismissed by the claimant.

Claim, in Burke Superior Court. Before Judge Holt, April Term, 1859.

These were claim cases, in which Holiday and others were plaintiffs in *fi. fas*, D. G. White, defendant, and Hodges,

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claimant. There were five executions levied on certain negroes as the property of defendant White, and claims respectively interposed. When the cases were called for trial, it was ordered, by agreement of parties, that the questions of law in the above stated cases, arising out of the will and codicil of Daniel White, as to the interest of Daniel G. White, and whether such interest be subject to executions against the said Daniel G. White, be argued and decided in vacation, if not argued and decided at this Term, with leave to either party to except to the decision within the time prescribed by law. At the caption of this order, the cases were stated as "Ashley Holliday et al. vs. Daniel G. White."

Under said rule, after argument, in vacation, at November Term, 1858, the presiding Judge made and delivered the following decision: "That the testator has by said will and codicil created a mere naked trust, a deposit of the legal title in Henry White, for the use of Daniel G. White, and the law transferring the possession to the use, leaves the property precisely as it was by the will. It is a trust executed, and judgment must be for the plaintiff."

At May Term, 1859, the cases were again called in their order for trial; whereupon, claimant in each of said cases, moved that an issue be made up and submitted to the jury. Plaintiff in *fa. fa.* objected, and moved that said claim, in each and all of said cases, under the decision aforesaid, be dismissed.

The Court refused to allow any further proceedings and dismissed said claims, the order of dismissal, describing said cases by the style of "Samuel A. Verdery, and others." To which rulings, orders and judgments, counsel for claimant excepted.

The following is a copy of the codicil to the will of Daniel White, above referred to; viz:

"I, Daniel White, of said county, being of sound mind and memory, and desirous of making a change of the manner in which the property given to my son Daniel G. White

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is to vest, do declare, make and ordain this as a codicil to my will heretofore made by me. From the incompetency of my son Daniel G. White, I direct, give, devise and bequeath, all the property given to him in my will, to my son Henry White, as trustee for said Daniel G. White."

It was likewise in proof that Hodges had been substituted trustee in lieu of Henry White.

McKENZIE; and SHEWMAKE, for plaintiff in error.

MILLERS & JACKSON; and JONES & STURGIS, *contra*.

By the Court.—LYON J. delivering the opinion.

[1.] This agreement between the parties to submit the "questions of law arising out of the will and codicil of Daniel White, as to the interest of Daniel G. White, under said will and codicil, and whether such interest be subject to executions against the said Daniel G. White," was not one to submit all the questions of law and fact that might be involved in the issue formed, or to be formed, in these claim cases; at least, such is not the letter of the agreement, and by that the Court must be governed, although we have no doubt, but that such was the intention of the parties. Whether the executions were valid, subsisting and unpaid liens; whether the title to the property claimed is derived under the will, and others that might be mentioned, were all open questions that might have been involved in the trial, and which had not been submitted, upon which the Court had not passed, and upon which the claimant was entitled to be heard, notwithstanding, that under the will such title vested in the defendant *in fi. fa.*, as made the property subject to the executions levied. We think, therefore, that the Court below erred in dismissing the claim cases.

[2.] The claims should have been submitted to the jury.

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and if, on the trial, the claimant could show no other title to the property than such as was created in Daniel G. White by the will and codicil of Daniel White, or no other reason to defeat the liens of the execution than the question growing out of a construction of that will, in respect to this property, already decided by the Court, then the property is subject, and so the Court must direct the jury, and so they must find, for this is an adjudicated and settled question by the decision of the Court, on the submission of the same to him, from which no appeal was taken; and so the claimant is concluded by that decision; he cannot go behind it. Still the claimant having interposed the claim, has a right to go to the jury with them if he insists upon it, and will take the risk. This is the mode prescribed by law for the trial and disposition of all claims, and as claimant has not waived this right, that proceeding must be followed by the Court below, unless he voluntarily withdraws the claim, which he has a right to do, if he chooses, but that is a question for him, and not the Court. If he willfully keeps the claims in Court, after he has been judicially informed as to what the law is, and he has no other excuse for doing so but that; the law has prescribed a penalty in the shape of damages for the delay, which this Court considers altogether ample. So the case must go back with instructions.

Judgment reversed.

JOHN MILLEDGE, plaintiff in error, vs. JAMES GARDNER, defendant in error.

- [1.] Under our statutes, the endorsement of a sealed instrument, although the signature of the endorser has no seal nor scroll attached to it, is itself a contract under seal, and the statutory bar applicable to it is twenty years.
- [2.] The claims of an endorser against the maker, to refund money which the endorser has paid on a judgment against him as such, though the judgment may be dormant, and the endorser may not have got control of it by an order of Court as prescribed by the statute, is never barred by the statute of limitations, so long as the endorser has it in his power to get control of the judgment and have it revived and paid. This he may do on a judgment obtained before the limitation Act of 1856, at any time within twenty years after the rendition of the judgment.

Complaint, in Richmond Superior Court. Tried before Judge HOLT, at July adjourned Term, 1859.

This was an action in the form prescribed by statute, brought by John Milledge, assignee, against James Gardner, as security on the following bond and endorsement, viz:

"GEORGIA—CITY OF AUGUSTA:

\$2,600. *Know all men by these presents, That I, John F. McKinne, late of the city of New York, am held and firmly bound unto James Gardner, Jr., of the city and State aforesaid, in the just and full sum of two thousand six hundred dollars; for the true payment of which, with interest from date, I do hereby bind myself, my heirs, executors, administrators, and assigns, unto the said James Gardner, his heirs, executors, administrators and assigns, firmly by these presents.*

Witness, my hand and seal, this tenth day of June, eighteen hundred and thirty-seven.

(Signed,) JOHN F. MCKINNE, [L. S.]

In presence of THOMAS W. MILLER, *Not. Pub.*"

(Endorsed,) "For value received, I do hereby assign the within obligation to John Milledge, June 10th, 1837.

(Signed,) JAMES GARDNER, Jr."

The defendant pleaded :

1st. The general issue and payment.

2d. The statute of limitations.

3d. Set-off.

4th. Payment, settlement, accord, and satisfaction.

5th. An amended plea of set-off in the nature of a debt due by plaintiff to defendant as an accommodation endorser on a note of nine hundred dollars, dated 5th January, 1842, and payable four months after date, at the Bank of Augusta, endorsed by James Gardner, Jr., Ann Milledge, John Milledge ; and upon which three several judgments were obtained by the President, Directors and Company of the Bank of Augusta, against the said maker and each endorser respectively ; and alleging that John Milledge and Ann Milledge, having failed and refused to pay the judgments against them, the defendant, who alleges himself to have been an accommodation endorser, as such paid off and discharged the one against himself, and that an entry to that effect was made on the *fi. fa.* against him, by the plaintiff's attorney in said case ; and that thereby a right of action accrued to the defendant against the plaintiff, to the extent of the amount thus paid ; and that by virtue thereof, under the laws of Georgia, he became entitled to the use and control of the *ieri facias* against the said John Milledge ; and the debt thus became an indebtedness in favor of the defendant, in the nature of a judgment debt, or of a debt by statutory liability, and was so plead as a set-off to the plaintiff's claim ; and that the plaintiff, by means thereof, became indebted to the defendant in said sum of money as so much money paid, paid out and discharged, for the use of plaintiff, &c. Said amended plea annexing exemplifications of three several judgments against the said John Milledge, James Gardner, Jr., and Ann Milledge, in favor of the President, Directors and Company of the Bank of Augusta.

To the said amended plea, with the exemplifications an

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nixed, plaintiff's counsel excepted, and moved that it be stricken out:

1st. Because, as contended, there was no privity between the plaintiff in those judgments and the defendant in the present proceeding, except as to the judgment against himself, which was paid off and satisfied on the second day of January, eighteen hundred and fifty, and the judgment, if unsatisfied, would be dormant, by the statute of limitations, and in no event could be plead as a set-off against the plaintiff, in this cause.

2d. As to the judgments against John Milledge and Ann Milledge, by defendant's own showing, executions had never issued on either of them, and therefore they were both dormant and barred by the statute of limitations; the judgments, as well as judgments and *fi. fas.*, if *fi. fas.* had been issued.

3d. Because the defendant, even as an accommodation endorser, is not entitled under the statute, in such cases provided, to use such *fi. fas.* except permitted by order of the Court, after having paid the costs; both of which he failed to show.

4th. The plaintiff's counsel insisted, that as to the exemplification of the judgment against Ann Milledge, in any event that should be stricken out of the amended plea, as irrelevant and tending to complicate and encumber the pleadings, it appearing by his own showing, that she was a subsequent endorser to the said James Gardner, Jr., upon the note on which the judgments were obtained.

The Court overruled the objections of the plaintiff as to said amended plea, both *in whole* and *in part*, and sustained the defendant by deciding (though with some apparent reluctance,) that the whole of said amendment should be received, for the then present; to which rulings and decisions of the Court, plaintiff's counsel excepted and assigned as error.

And in the further progress of the trial of said issue, the plaintiff having read the pleadings, original and amended,

and introduced in evidence the bond and endorsements and transfer thereof, before described, closed his case.

The defendant, by his counsel, moved for a nonsuit, because defendant's liability was alone upon a parol endorsement of a sealed instrument, and that he was protected by the statute of limitations after six years from his undertaking—it being a collateral undertaking, and he not being liable under the statute of limitations applicable to instruments under seal.

Plaintiff's counsel contended that by his endorsement the defendant became security on the bond he endorsed, and as such was liable, until the same should be paid off and discharged.

The Court, after argument, granted the nonsuit, holding that the cause of action, arising on said endorsement and assignment of said bond, was barred after six years from the date of making thereof.

To which decision and order counsel for plaintiff excepted.

J. C. & C. SNEAD; MILLERS & JACKSON; and E. A. NISRET, for plaintiff in error.

E. STARNES, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] The first question is, whether the statutory bar applicable to this action is twenty years, the period applicable to contracts under seal, or six years, the period applicable to written contracts not under seal; and this question depends upon the further one, whether this endorsement makes a sealed contract or not. The presiding Judge held, that it did not, but we think it does. The paper is assignable by endorsement under our Judiciary Act of 1799. Our Act of 1826, *Cobb's Dig.* page 494, gives the endorser of assignable

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paper, the privilege of defining his liability in his endorsement, but fixes a statutory liability in the absence of an expressed one. The endorsement in this case, is the simplest possible. It does not express nor hint any liability at all. It is a simple transfer of the paper, signed by Mr. Gardner, the defendant. It is then a clear case where the statute fixes the liability. The statute enacts that "whenever any person whatever endorses a promissory note or other instrument, he shall be held, taken, and considered as security to the same, and be in all respects bound as security, until said promissory note or other instrument is paid off and discharged." Remarking that the liability to which this statute relates, is the liability of an endorser to the holder, and not perhaps the liability of endorsers among themselves, I think it is exactly that of a security. An endorsement which does not define the liability to be created by it, is, under this statute, so far as the holder is concerned, simply a mode of signing the paper as security. Now this endorsement has no seal nor scroll attached to it, but the instrument to which it serves as a signature as security, is a sealed instrument. The intention expressed in the body of it, that it shall be a sealed instrument, makes it one under our Act of 1838, without any seal or any scroll attached to any one of the signatures to it. Whoever signed it, whether as principal or as security or as endorser, and whether with or without a seal or scroll attached to his signature, signed a paper which by its own terms was a sealed instrument under the statute. The endorsement expressing no contract in itself, accedes to the contract which is expressed in the paper, and that is a specialty contract. It does this, if it does anything. The endorsement then created a specialty contract, and the statutory bar applicable to it is twenty years instead of six years.

[2.] Was the set-off as pleaded a good one originally, and if so, what is the statutory bar applicable to that? The case stated by the plea, is that Mr. Gardner, the defendant, had paid off a judgment obtained against him as endorser on a

note whereon judgments had likewise been obtained against Mr. Milledge, as maker, and Mrs. Ann Milledge, as a subsequent endorser, and the plea set out all these judgments as a description to identify the contract on which Mr. Gardner had paid money for the use of Mr. Milledge. We cannot see any reason to doubt that the plea states a clear matter of set-off. Nor do we think it is barred by the statute of limitations. We think it is a debt due by judgment under our statute giving endorsers and securities the control of executions which they may pay off, for reimbursement, out of the principal. It was insisted that the judgment was dormant. So it was, but it was not dead. It only slept, and could have been waked, and new vigor infused into it. The money expressed in it, was still a debt due on judgment, and the statutory bar applicable to the *debt* was twenty years. It was insisted again that the plea did not show that Mr. Gardner had control of the judgment, because it did not allege that he had paid the cost due on it, and obtained an order of Court giving him control in the manner prescribed by statute. It is immaterial to this purpose, whether Mr. Gardner had control of the judgment or not. He surely had a right, at the very time when Mr. Milledge brought this suit against him, to pay off the costs and get an order giving him control of the judgment, and then to revive the judgment and make Mr. Milledge refund to him every dollar due on it. That is to say, he pleaded a cross debt which he had the means of forcing Mr. Milledge to pay, and which therefore was not, and could not be *barred*.

Judgment reversed.

Mullings vs. Bothwell.

JESSE T. MULLINGS, plaintiff in error, vs. JOHN W. BOTHWELL, defendant in error.

The fact that a plaintiff in *fi. fa.* points out property to the Sheriff and orders him to levy on it all, is an indemnity to the Sheriff for making the levy as ordered, and if he makes no objection to the sufficiency of the indemnity, he must pursue the instructions, or else assume the burthen of showing that they were unreasonable, or at least that the course which he pursued in lieu of them, has not resulted in damage to the plaintiff.

Rule Nisi, in Jefferson Superior Court. Tried before Judge HOLT, at the April Term, 1859.

This was a rule against Mullings, as deputy Sheriff, calling on him to show cause why he should not pay over to the plaintiff in *fi. fa.* the amount due on a *fi. fa.* placed in the Sheriff's hands. The facts as certified by the bill of exceptions, were these: The principal of the *fi. fa.* was \$589 89, with interest on part of it from 1st January, 1857, and on the remainder from 1st January, 1858, with costs. The plaintiff ordered the Sheriff to levy on all the property of the defendant, and pointed it out, consisting of eight negroes, four horses, one buggy, fifty-five head of stock hogs, and eighteen head of stock cattle, telling the Sheriff at the time, that there was a mortgage which covered all of the property. The Sheriff advertised the whole property for sale, but sold only one negro man, who, under the notice which was given of the mortgage at the sale, brought not quite fifty dollars. The levy which the Sheriff entered on the *fi. fa.* covered only the negro sold, who, if unencumbered, would have sold for more than enough to pay off the *fi. fa.* It also appeared that older *fi. fas* against the same defendant to the amount of eight or nine hundred dollars, had been put into the hands of the Sheriff to claim money raised by the sale. The amount of the mortgage does not appear. On these facts the Judge made the rule absolute, and the Sheriff excepted.

WRIGHT & DERRY; and THOS. H. POLHILL, represented by DANIEL & ANDERSON, for plaintiff in error.

SHEWMAKE, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

We think the Judge was right in making this rule absolute against the Sheriff. He was ordered to seize and sell all of the property, and the mortgage which covered it all, was mentioned to him as a reason for a levy which would have otherwise appeared to be excessive. An additional reason to justify it, was the fact brought forward by the Sheriff as an excuse, that there were older *fi. fas* to claim the money. The Sheriff decided for himself, that the levy ordered would be an excessive one, and refused to make it. He seems to think, from one excuse which he makes, that the plaintiff had no right to sell more property than what was of sufficient value to be worth the amount of his own *fi. fa*. This was a great mistake. The plaintiff's right was to sell property enough to satisfy prior liens, *and* pay his *fi. fa*. Another cause shown by the Sheriff was, that it did not appear that there was property enough, if it had all been sold, to pay off all prior liens, and the plaintiff's *fi. fa*, and so did not appear to the Court that the plaintiff could have got his money, even if his instructions had been followed. It will be time enough for us to decide the question when it is made, whether the Sheriff may excuse himself for a breach of proper instructions, by showing that the breach did no injury, but the question made here is, whether the burthen of proof is on the plaintiff in *fi. fa*, to show that the violation of his proper instructions has injured him. We think not. Before the Sheriff could avail himself of this excuse, it was at least incumbent on him to show affirmatively, that the property pointed out was *not* sufficient to pay the plaintiff, after first paying the prior liens. This does not appear. The amount

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of the mortgage lien no where appears, but the older *fi. fas*, amounting to eight or nine hundred dollars, were surely not enough to have prevented the plaintiff from making the whole of his money out of eight negroes, four horses, one buggy, fifty-five head of hogs and eighteen cows. The fact that the plaintiff pointed out the property, was an indemnity to the Sheriff for levying on it all, and the Sheriff having made no objection at the time to the sufficiency of the indemnity, can excuse himself for departing from the instructions, only by showing that the instructions were unreasonable, and his own action reasonable and proper under the circumstances, or at least that the plaintiff had received no damage from the course he actually pursued in lieu of that which he was ordered to pursue. He showed neither the one nor the other.

Judgment affirmed.

L. D. LALLERSTEDT, plaintiff in error, vs. W. A. GRIFFIN,
defendant in error.

When a draft is drawn upon one, who is styled, Treasurer, &c., of an unincorporated Mining Company, and the drawee accepts individually, it may be treated by the holder as his personal contract.

Assumpsit, in Columbia Superior Court. Nonsuit by Judge Holt, at September Term, 1859.

This was an action of assumpsit, brought by Lallerstedt, endorsee, against Griffin, on a draft, of which the following is a copy, to-wit:

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" AUGUSTA, GA., 29th Oct., 1858.

To W. A. Griffin, Treasurer of the Griffin Mining Co. :

Ninety days after date, pay to the order of John M. Galt, President, five hundred and thirty-seven dollars and five cents, for value received.

(Signed,)

JOHN MILLEDGE,
Sec'y G. M. Co."

(Endorsed,)

"JOHN M. GALT, President"

And which draft was accepted by the defendant, by writing across the face of the paper, "*accepted, W. A. Griffin.*"

At the trial, plaintiff offered in evidence the draft. Defendant objected to its introduction, on the ground, that the acceptance created no liability upon him individually, but was an undertaking of the Griffin Mining Company.

The Court sustained the objection, and excluded the paper, and ordered a nonsuit. To which ruling and decision, counsel for plaintiff excepted.

GIBSON ; and LALLERSTEDT, for plaintiff in error.

MILLERS & JACKSON, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Was the Court right in nonsuiting the plaintiff?

If the acceptance by Griffin might be treated as an individual undertaking, then the ruling was wrong. And that it might be so considered, we think is abundantly sustained by the books. *Story on Agency* 159; 6 *Bac. Abr.* 802, 807; 2 *Str. Rep.* 955; *Cas. Tenet, Hard.* 1; 1 *Bailey on Bills, 5th edition, ch. 2, sec. 7, note 48; Paley on Agency by Lloyd, ch. 6, sec. 1, pages 378, 379.*

It is true, that Judge Story, in commenting upon the case of *Thomas vs. Bishop*, 2 *Str. Rep.* 955, and which is the starting point for the doctrine, says, that it seemed to press

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the rule to the utmost limit of the law, if indeed upon principle, it is sustainable at all. He did not deny however, that upon authority, it was within the limit of the law.

On the contrary, we apprehend, the general rule to be, that where an agent, professedly dealing in the name of his principal, yet signs the contract individually, it is at the election of the other party to treat it as his own personal contract. And this is a just inference from the form of the contract itself, as to what was the intention of the person sought to be made liable.

ISAAC LEVY, Sheriff, plaintiff in error, vs. CURTIS H. SHOCKLEY, defendant in error.

- [1.] To constitute a levy, there must be a seizure of the property by the officer, and a taking of it into his control.
- [2.] A Sheriff is liable for the money due on a *fi. fa.* in his hands, if he refuses or fails to levy it on property which is pointed out to him by the plaintiff in *fi. fa.*, without making any objection to making the levy for want of indemnity. The fact that the plaintiff points out the property, is indemnity to the extent of his ability to respond, and if that is not sufficient, the officer is bound to make the objection at once, so that it may be met and removed.

Certiorari, from Richmond county. Decision by Judge HOLT, at October Term, 1859.

This case arose in the City Court of Augusta, upon a rule sued out at the instance of Curtis H. Shockley, against Isaac Levy, the Sheriff of said city, to show cause why he should not pay over the amount due on an execution, placed in his hands, in favor of said Shockley against one James M. Simpson. The return of the Sheriff was traversed by the plain

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tiff in *fi. fa.*, and issue joined upon the same. The case coming up for trial, the Judge of the City Court withdrew it from the jury and dismissed the rule. To correct this decision, plaintiff in execution removed the case by certiorari to the Superior Court.

Upon the argument of said certiorari, the parties being represented by their counsel, from the return it appeared, "that the Sheriff had in his hands the *fi. fa.* before described, and was directed by the plaintiff to levy on two horses of defendant, pointed out by plaintiff; that he endorsed the levy on the writ, and advertised the horses for sale, but did not sell them; his excuse for not selling, being that on the day of sale when calling for the horses at the livery stables of W. E. Archer, one horse was not there, and the other, Archer refused to deliver, until payment of stable expenses, which plaintiff would not make; that when the levy was made the horses were at Archer's, subject to livery expenses, then due and claimed. That the horses were left at the same stable, by the Sheriff, to be kept on his account, and written notice given to Archer to that effect. That one of the plaintiff's counsel, when informed by the Sheriff of what he had done, expressed himself satisfied, and another said he "had done right, and approved of the notice given to Archer."

The showing of the Sheriff against the rule absolute in the City Court, among other things, shows, "That immediately on the plaintiff having pointed out the horses, he left the stables."

"That he advertised said levies by the positive directions of plaintiff, and did not know that the horse was out of the way till the day of sale." And by the first response of the Sheriff it is shown "That W. E. Archer stood ready to pay a price for the horse that was on hand, on the day that the sale should have taken place, that would have paid said *fi. fa.*, but the plaintiff refused to pay the livery on him, and he could not get possession, in order to make the sale."

The counsel for plaintiff contended before the Superior

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Court aforesaid, that the City Court had erred in withdrawing the case from the jury, and also, in refusing to make the rule absolute against the Sheriff; and that for these reasons the certiorari should be sustained, and the decision and ruling of the City Court reversed.

Counsel for the Sheriff insisted that there was no error committed by the City Court in withdrawing said issue from the jury and discharging the rule; because, as they insisted, from the showing of the Sheriff, it was on account of the refusal of the plaintiff to pay the livery due on them, that he could not get the possession of the horses; and that upon a proper consideration of the responses of the Sheriff, he never had the possession of the horses, and that the said responses should be taken and considered as an amended return of the Sheriff, as to the levy endorsed upon it and in explanation of the same, and that the certiorari should be discharged.

His Honor, the Judge of said Superior Court, sustained the certiorari on the first ground: "the refusal to make the rule absolute," and ordered that the case be returned to the City Court of Augusta, with instructions to make the *rule nisi*, which had been moved by the party, the plaintiff, against the Sheriff, absolute."

To which decision and ruling of his Honor, the Judge of the Superior Court, the defendant, the Sheriff, by his counsel, then in Court, excepted for error, insisting that the certiorari should have been overruled.

J. C. & C. SNEAD, for plaintiff in error.

MILLERS & JACKSON, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

We do not think the Sheriff was liable in this case on account of negligence in allowing the property on which he

had levied, to be put out of the way; for we do not think that there was any levy at all. According to the facts, the horses never were seized by him and in his control. But we do think he was liable for failing to make a levy. The fact that the plaintiff in *fi. fa.*, pointed out the property for a levy, was indemnity to the Sheriff; for the plaintiff was bound to protect the officer in doing the specific thing which he had ordered him to do. If that indemnity was not *sufficient*, the Sheriff could have objected to it on that ground, and have refused to act until it had been made sufficient. He can not be heard now with the suggestion of an objection which, if made at the proper time, might have been promptly met and removed. We think the rule was rightly made absolute.

Judgment affirmed.

WILLIAM K. KITCHEN, plaintiff in error, vs. STEPHEN B. ROBBINS, defendant in error.

- [1.] Admissions of an innkeeper that his guest has lost goods in his house, when proven by a witness who heard the admissions, are sufficient proof of the fact of loss, to authorize the introduction of evidence to show the amount of the loss, although the innkeeper when put on the stand as a witness by the other party, may state that the admissions by him were founded solely on statements to him by the plaintiff.
- [2.] When one party puts the other as a witness on the stand under our statute, he is entitled to have his belief as well as his knowledge.
- [3.] A guest having shown the loss of his goods at an inn by other evidence, is himself a competent witness to show the amount of the loss.

Certiorari, in Richmond Superior Court. Decision by Judge HOLT, at October Term, 1859.

This cause arose in the City Court of Augusta, being an action on the case brought by William K. Kitchen, against Stephen B. Robbins, to recover the value of a gold watch and eighty-five dollars in money, alleged to have been stolen from plaintiff, on the night of 27th day of December, 1858, from the room occupied by him in the inn or hotel, kept by defendant in the city of Augusta, and while plaintiff was asleep in the room.

After proving that the defendant kept a common inn in the city of Augusta, on or about the 27th day of December, 1858, and that on or about that day, plaintiff and his family were guests at said inn, plaintiff proved by Curtis H. Shockley, who was examined by commission, that during the month of December, 1858, the defendant, Stephen B. Robbins, informed him, that the plaintiff had lost some money and (as witness thought) a gold watch also.

Plaintiff, by his attorneys, then offered as evidence, his own testimony, taken by commission, for the purpose of proving his actual loss; the amount of money and the value of the watch; upon the ground that from the necessity of the case, no other evidence could be procured to show a loss which occurred while the plaintiff was asleep; and upon the ground of public policy, springing out of the necessity of the case and the nature of the subject. The Court ruled out the testimony of the plaintiff, who excepted at the time to the decision.

The plaintiff then placed the defendant, Stephen B. Robbins, on the stand; by whom he proved that on the night of the 27th day of December, 1858, the plaintiff, his wife and daughter were guests at his inn, and that he had been paid in full for their board.

Plaintiff's counsel then asked of the defendant whether or not he believed that the plaintiff was robbed of said watch and money on said night, and requested him to give the reasons of his belief. The defendant replied that he had no

belief except what was founded upon the statements of the plaintiff to him.

The Court refused to allow the defendant to give his belief, though insisted upon by plaintiff's counsel; to which refusal the plaintiff excepted.

Plaintiff again offered in evidence his own testimony, upon the grounds aforesaid, which the Court refused to allow as evidence, and plaintiff again excepted. The case was then submitted to the jury, who found for the defendant.

Upon this statement of facts, a writ of certiorari was granted; and after argument on both sides in the Superior Court for said county, the Judge of that Court ordered a new trial, upon the grounds that "the loss having been proven by the admissions of the defendant," the "testimony of the plaintiff was admissible to prove the amount and value of the property lost."

And, secondly, that the plaintiff, when the defendant was put upon the stand, "was entitled, on the direct examination, to have his belief, and the reasons of his belief."

To which decision defendant, by his counsel excepted, and tenders this bill of exceptions, and says that the Court erred:

1st. In holding that the admissions of the defendant, founded upon the statements of the plaintiff, was sufficient evidence of the fact of loss, to admit any evidence of the value of the loss.

2d. In holding that the rule of law which admits a party, in an action against a common carrier, to testify in his own behalf as to the contents of his trunk which had been lost, is also applicable to innkeepers, in cases of this kind.

3d. In deciding that the defendant when placed upon the stand by the plaintiff as his witness, might be compelled, on the direct examination, to give his belief, and the reasons of his belief, as to any fact not within his own knowledge.

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JOHN H. HULL; and EDWARD J. WALKER, for plaintiff in error.

MILLERS & JACKSON, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

[1.] The first error assigned is on the ruling that the admissions of the defendant founded on statements to him by the plaintiff, were sufficient proof of the fact of loss, to authorize the introduction of evidence concerning the amount of the loss. I remark in the first place, the admissions did not appear to have been founded on statements of the plaintiff, so far as was disclosed by Mr. Shockley, who was the witness that testified to the admissions. He stated the admissions to have been made without any qualification or suspicion expressed as to their truth, and without any mention of the source from which the defendant's knowledge of the facts had been derived. We think the testimony of this witness was sufficient proof of the fact of loss, to authorize the introduction of evidence to show its amount, and it was not for the Judge to pronounce that the testimony of this witness was to be weakened or destroyed by the subsequent statement of the defendant, that all his knowledge had been derived from the plaintiff. The jury was the tribunal to compare the witnesses, and weigh the evidence. But why should not the admissions be good evidence even if founded on the statements of the other party? Are no admissions good against a party, unless founded on his personal knowledge? The admissions would not be made except on evidence which satisfies the party who is making them against his own interest, that they are *true*, and that is evidence to the jury that they are true. Admissions do not come in, on the ground that the party making them, is speaking from his personal knowledge, but upon the ground that a party will not make admissions against himself unless they are

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true. The fact that he makes them against his interest, can be reasonably explained only on the supposition that he is constrained to do so by the force of the evidence. The source from which a knowledge of the facts is derived, is a circumstance for the jury to consider, in estimating the value of the evidence, but that is all.

[2.] And on the same principle as well as on another, we think the plaintiff had a right to the *belief* of the defendant when the latter was on the stand as a witness, under our statute. He was a party as well as a witness, and on the principle just stated, the plaintiff would have been permitted to prove, that the defendant had said, he *believed* the plaintiff had lost the watch and money. He would have been permitted to prove that the plaintiff had said so, in the presence of the defendant, and that the latter did not deny it. This evidence would show no personal knowledge of the fact stated, on the part of the silent party, but it raises a presumption that he *believed* it. The belief of a man against his own interest is a fact for the jury to consider as evidence, and if this belief may be proven by admissions before witnesses or inferred from silence, surely it may be proven by the oath of a witness who knows, as the party does know, what his belief is. Courts of Equity will require parties to answer not only according to their knowledge, but also according to their belief, and our Act which permits one party to put the other on the stand as a witness, is stated in its very caption to be a mode of obtaining a discovery at common law, in *lieu* of going into equity. And this is the additional principle on which the belief of the defendant was admissible evidence.

[3.] After the loss had been proven, was the plaintiff a competent witness to prove the amount of it? It was urged in the argument, that the rule of evidence against a common carrier, should not apply against an innkeeper, because it was said the common carrier has a more exclusive custody of the goods than an innkeeper has. This reason goes to

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question the propriety of subjecting the innkeeper to the same *liability* for loss, but not in the least does it suggest a discrimination in the mode of arriving at the loss, the liability being admitted. A guest at an inn may have more control over his trunk, than a passenger on a car has over his, but he is no more likely to exhibit the contents of it to other people, and there is no more probability of his having witnesses, therefore, to the question of contents or *amount of loss*. The rule stands on necessity in the one case, and we think the same necessity exists in the other case, and that the Judge properly held the rule to be the same in both cases.

Judgment affirmed.

LUCINDA JOHNS, plaintiff in error, vs. GEORGE JOHNS, Sen'r,
defendant in error.

- [1.] The communications of one person to another are incompetent testimony, being hearsay only.
- [2.] Confessions of parties against themselves are admissible in a libel for a divorce, when there is no suspicion of collusion.
- [3.] In a suit for divorce, the fact that the plaintiff had a friendly interview with his wife, and requested her to return home and live with him, does not amount in law to a condonation of the libel.
- [4.] To a libel for divorce, on the ground of cruelty in the wife, she may re-criminate the adultery of the plaintiff, her husband.

• Libel for divorce. Tried before Judge COCHRAN, at the October Term, 1859, of Charlton Superior Court.

This was a libel for divorce, by George Johns, Sen'r, against Lucinda Johns, his wife, on the ground that said Lucinda had attempted to poison libellant. There was an amendment to the libel, charging respondent with adultery.

Upon the trial, libellant offered in evidence the following testimony:

George Johns, Junior, son of libellant, testified: That he saw a man by the name of Wheeler kiss respondent, in the house of libellant; and that respondent had put the strychnine in coffee and biscuit to poison libellant, and that he sat at his father's feet to prevent it; that the strychnine had been put in a box of his, and respondent got it by obtaining the key to said box from him; the strychnine was found hid in a crawfish hole, about 250 yards from the house; that he was induced to go there to hunt it, by Mrs. Wheeler having told him about it.

The statements of Mrs. Wheeler were objected to by respondent, but they were admitted by the Court as inducement to witness's conduct, he testifying that they found it there, and that it was taken from respondent's bosom.

Cross-Examined.—The kissing took place in the hall, the parties standing up, touching each other with their lips; libellant was in the piazza at the time. Dyass, from whom he purchased it, told him it was strychnine, and that he put it for *varmints*, and it had killed four; that he did not know that it had killed them, but he found them dead, and supposed the strychnine had killed them; that he did not see the respondent take the strychnine out of his box, nor did he see it taken from the crawfish hole, nor from respondent's bosom; that he did not see any strychnine put in the coffee or biscuit. He asked respondent what possessed her to do it; she said she did not know, unless it was the devil; and that he threw out the coffee, and she picked up the biscuit and carried it off; Mrs. Wheeler told him that poison had been put in the coffee and biscuit. Respondent objected to Mrs. Wheeler's sayings; the Court refused to rule these sayings out, as they had been drawn out on cross-examination by respondent's counsel, and respondent excepted. Libellant here closed.

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Respondent introduced the following testimony:

Allen Dixon testified: That he saw libellant in bed with a Mrs. Ruis, at 8 o'clock at night and early next morning, in the manner of husband and wife, since the commencement of this suit.

It was also proved by another witness, that libellant had been in bed with Mrs. Ruis, at her house at night, and on two other occasions with a Mrs. Baker, all since the commencement of this suit.

Jas. M. Alberton testified: That libellant told him that he had turned respondent out of his house for loose conduct and trying to poison him. On cross-examination, testified, that respondent was a loose woman.

Zeyheriah Roberts testified: That respondent resided at his house in Jacksonville, Florida, as a boarder, upwards of nine months; that her conduct was chaste and virtuous, so far as he knew; that while at his house libellant visited her, treated her kindly, and told witness he wanted her to go home with him; this occurred after the institution of this suit.

The case being closed, respondent's counsel requested the Court to charge the jury—

1st. That what was said by Mrs. Wheeler, about the strychnine and poisoning, was not evidence.

2d. That the confessions of the parties were not evidence.

3d. That if libellant was reconciled to respondent, when he visited her in Jacksonville, it was condonation, and they must find for respondent.

4th. That if the jury believe from the evidence, that libellant had been guilty of adultery since the commencement of this suit, that he was not entitled to a divorce.

The Court refused to charge the two first requests, and charged the two last, with a qualification, and respondent excepted.

The Court charged the jury, that the sayings of Mrs. Wheeler being drawn out by respondent's counsel on cross-exami-

nation, were evidence as inducement. That the confessions of the parties are admissible in evidence. That if they believe that respondent attempted to take the life of libellant, it was cruel treatment; and if they find cruel treatment, sufficient to authorize a divorce, then adultery in libellant is no bar to a divorce. To which charge respondent excepted.

The jury found for libellant, granting a divorce *a vinculo matrimonii*, and allowed respondent no alimony. The property belonging to libellant, as contained in the schedule filed, amounted to \$11,000, and there were no children, and the property came by the husband.

Whereupon, respondent tendered her bill of exceptions, assigning as error the rulings, decisions, charge and refusal to charge above stated and excepted to.

WM. B. GAULDEN, for plaintiff in error.

LONG & ROLL; W. H. DASHER; and G. B. WILLIAMSON,
contra.

By the Court.—LUMPKIN J. delivering the opinion.

[1.] The testimony of George Johns, Junior, the son of the plaintiff, is so contradictory and confused, that I scarcely deem it necessary to analyze it minutely. It would be dangerous in the extreme, to put asunder what God has joined together, upon such proof.

Much of it should have been rejected, especially the information which Mrs. Wheeler gave to him, that strychnine was put in the biscuit and coffee. And that was all the knowledge he had upon the subject. The communication led to no discovery whatever. For the fact was not proven that the articles of food were poisoned. Nor should he have been allowed to testify that he stood at the feet of his father to protect him from being poisoned.

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[2.] We think the Court was right in admitting the confessions by the parties against themselves. There is no pretence that there was any collusion between the parties to procure a divorce.

[3.] We hold, too, the Court committed no error in refusing to charge the jury, that the interview at Jacksonville, Florida, between plaintiff and defendant, as proven by the witness, Roberts, was a condonation of the libel. It was proper and overwhelming testimony, to be urged in argument to the jury, to show that the husband did not apprehend any danger from living with his wife; and thus to rebut the charge of cruelty at her hands. It amounted to this and nothing more.

The libel was founded upon two grounds—adultery and cruelty; but there being no proof to support the first charge, except the saintly kiss, witnessed by young Johns in the parlor, between his step-mother and Mr. Wheeler, the husband perhaps of Mrs. Wheeler, the informant of the naughty doings of Mrs. Johns, the case went to the jury upon the charge of cruelty alone.

[4.] Can the defendant counter-plead to this, the offence of adultery in the plaintiff? It has been held by the English Courts, that cruelty cannot be pleaded in bar to a suit for adultery; but the converse of this proposition has not been laid down, namely, that when the husband alleges cruelty against the wife, she cannot defend by showing his adultery. And, indeed, it appears that she can. 2 *Atkins*, 96; 7 *Eng Ecc. Rep.* 377, 380; *add Ecc. Rep.* 411–12; *Eng. Ecc. Rep* 158, 171.

In Missouri they have a statute similar to our Act of 1850, (*Cobb*, 226,) upon the subject of divorce. It has a provision too like ours, that where both parties are guilty, no divorce should be decreed. And under this statute, the Courts of that State have held, that the decree must be refused where both parties are guilty of any of the enumerated offences. *Neagle vs. Neagle*, 12 *Miss.* 53; *Ryan vs. Ryan*, 9 *Ibid.*, 539.

And it occurs to us that it is difficult to answer the reasoning which conducts to this conclusion. For if each offence is the same, it cannot be said that one is more heinous *in law* than another, however it may be in morals. Each alike authorizes a total disruption of the nuptial tie. And in law, as in mathematics, things that are equal to the same thing, are equal to one another. True, our statute does not make it imperative to grant a total divorce in all cases of cruel treatment. But the discretion operates against the plaintiff in this case. His adultery demands it, whether the wife's cruelty does or not.

The law contemplates the innocence of the party seeking the divorce. How can the Courts decide which is the innocent and which the injured party, when both, under the statute, are in *pari dilecto*? Can either have the contract vacated at the expense of the other, when it has been equally infringed by both?

The true rule, we apprehend, although it is not necessary to go so far in this case, is to allow the defendant to recriminate for any of the causes which would dissolve the contract, whether it be *eodum dilectum* or not.

JEDD W. BIGGS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] If the husband makes a violent assault upon one who attempts the seduction of his wife, and her character for virtue is impeached, it is competent for the husband, when on trial for the assault, to give evidence in support of the general character of his wife for chastity.

[2.] If to kill another with a gun, pistol, or other like instrument, would, under

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the circumstances, be justifiable homicide, under the penal code, the failure to kill will not subject the party to the offence of shooting at another, under the Act of 1856.

[3.] If a man takes the life of another who attempts the seduction of his wife, under circumstances of gross and direct aggravation, it is for the jury to find whether the case stands upon the same footing of reason and justice, as other instances of justifiable homicide enumerated in the penal code.

[4.] When the injured husband meets one, the next morning, who has attempted, over-night, the violation of his marriage bed, and fires upon him, it is right and proper to give in evidence the previous occurrence, as a justification or excuse for the act.

Indictment, in Richmond Superior Court. Tried before Judge Holt, at October Term, 1859.

The plaintiff in error was indicted in the Court below, for an assault with intent to murder. There was also a count for shooting at another, not in his own defence, contrary to the statute in such cases made and provided.

The cause was submitted, under the testimony and charge of the Court, to the jury, who found the defendant guilty under the second count in the indictment, with a recommendation to the mercy of the Court. Whereupon, defendant's counsel moved for a new trial upon the following grounds:

1st. Because the verdict is contrary to the preponderance of the evidence.

2d. Because the verdict is contrary to law.

3d. Because the Court decided that Mrs. Biggs was an incompetent witness.

4th. Because the Court ruled out the evidence of George A. Oates, as to the general character of Mrs. Biggs for virtue and chastity.

5th. Because the Court charged the jury, that if a man kill another, that other being at the time in the act of adultery with the slayer's wife, the killing would be voluntary manslaughter and not justifiable homicide.

6th. Because the Court held, that shooting at the adulterer under such circumstances, would be a violation of the Act of 1856 on that subject; but that unless an act of criminal

connection be shown in this case, these remarks had no application to the case, and are principles not necessary to be considered by the jury.

7th. Because the Court charged the jury, that under no circumstances of aggravation, however gross and direct, would a man be justifiable in taking the life of another, who attempts the seduction of his wife.

8th. Because the Court charged the jury, that if a man shoot at another, under such circumstances, and fail to kill, he is guilty of assault with intent to murder, if there be malice; or, shooting at another, under the Act of 1856, if there be no malice.

9th. Because the Court charged the jury, that although the shooting at another, might, if it resulted in death, be justifiable homicide, yet if death did not ensue, it would be a crime under the Act of 1856, unless it were done in self-defence.

10th. Because the Court charged the jury, that the only defence to the crime of shooting at another, is, that it was done in the prisoner's own defence.

11th. Because the Court charged the jury, that whatever may have occurred on the night previous to the difficulty at the breakfast table, it could not amount to a justification or excuse for the act of shooting on the morning after that difficulty; and that if the prisoner commenced the assault at the breakfast table by laying violent hands upon Parish, and by first shooting at him, even the plea of self-defence is taken away from him.

12th. Because the verdict was against law, and strongly and decidedly against the weight of evidence.

All of which said charges, rulings and decisions, in said motion set forth, the Court did make.

In the progress of the trial, and in the argument of the case before the jury, the defendant's counsel relied for his defence, not only on the twelfth, thirteenth and fourteenth sections of the fourth division of the penal code, in relation to

self-defence, but also, and mainly upon the sixteenth section of the fourth division of the penal code, insisting that this case presented one of those instances which stand upon the same footing of reason and justice, as those enumerated in the previous sections of the same division; and if death had resulted from the shooting, it would have been justifiable homicide, and that as death did not ensue, the shooting was not a crime, but was justifiable.

At the said Term, to-wit, on the 26th day of November, 1859, the Court overruled said motion for a new trial, upon all the grounds therein set forth; to which said decision, the said defendant by his counsel excepted, and now assigns the same as error.

And now, within thirty days from the close of said Term of the Court, at which said decision was rendered, tenders this his bill of exceptions, and prays that the same be certified according to the statute in such cases made and provided.

MILLERS & JACKSON, for plaintiff in error.

ATTORNEY GENERAL, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

[1.] Ought the testimony of George A. Oates, as to the general character of Mrs. Biggs for virtue and chastity, to have been rejected?

Her reputation in this respect had been implicated both by the conduct and evidence of Eleazer M. Parish. And if she was the woman he took her to be, the conduct of her husband would have been less justifiable in resorting to the means he did, to rescue and protect her from insult and importunity. We hold, therefore, that the proof should have been received.

[2.] The 9th charge given by the presiding Judge to the jury, was in these words: "That although the shooting at

another, might, if it resulted in death, be justifiable homicide, yet if death did not ensue, it would be a crime, under the Act of 1856, unless it were done in self-defence."

Such we concede is the letter of the 3d section of the Act of 1856. It provides, that from and after its passage, that "any person who shall be guilty of the offence of shooting at another, or at any slave or free person of color, except in his own defence, with a gun, pistol, or other instrument of the like kind, shall, on conviction, be punished by a fine not exceeding one thousand dollars, and imprisoned not less than twelve months, or confinement in the penitentiary at the discretion of the Court." *Pamphlet Acts 1855-56, p. 265.*

By the penal code, it is justifiable homicide to kill another, not only in self-defence, but in the defence of one's habitation, property or family, against one who manifestly intends to commit a felony on either. Can it be believed that the Legislature intended, that if a husband or father shoots at one who is attempting to commit a rape on his wife or daughter, and fails to kill him, he is liable to be convicted under this Act, and imprisoned in the penitentiary? Never, we apprehend. The effects of such a construction would be too monstrous. We must deviate then from the letter of the law, seeing that if literally interpreted, it leads to such absurd consequences, upon the same principle that it was decided, after long debate, that the Bolognian law, which enacted that whoever drew blood in the streets should be punished with the utmost severity, did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit.

If it be justifiable homicide to shoot down a burglar who forcibly invades your house, with intent to commit a felony, as it undoubtedly is, and yet if you fail to kill him, you subject yourself to the penalty of the Act of 1856, the title of the statute should be amended. It should be "An Act to encourage good shooting." And yet it would seem to be

passed for the purpose of preventing shooting altogether, except in cases of self-defence.

[3.] His Honor, the presiding Judge, charged the jury, "that under no circumstances of aggravation, however gross and direct, would a man be justifiable in taking the life of another, who attempts the seduction of his wife."

This instruction brings up broadly the meaning of the 16th section of the 4th division of the penal code. After treating of the various grades of homicide, murder, manslaughter—voluntary and involuntary and justifiable—it is provided that "all other instances which stand upon the same footing of reason and justice, as those enumerated, shall be justifiable homicide."

What is the meaning of this section? It signifies something. And it is the duty of the Courts to give it effect. It has been suggested, that to bring cases within this provision, they must be accompanied with force. But has the Legislature so limited it? Is it not more reasonable to suppose, that it was their purpose to clothe the juries in criminal cases, in which they are made the judges of the law as well as the facts, with large discretionary powers over this class of offences; and leave it with them to find whether the particular instance stands on the same footing of reason and justice as the cases of justifiable homicide specified in the code? Has an American jury ever convicted a husband or father of murder or manslaughter, for killing the seducer of his wife or daughter? And with this exceedingly broad and comprehensive enactment standing on our statute book, is it just to juries to brand them with perjury for rendering such verdicts in this State? Is it not their right to determine whether, in reason or justice, it is not as justifiable in the sight of Heaven and earth, to slay the murderer of the peace and respectability of a family, as one who forcibly attacks habitation and property? What is the annihilation of houses or chattels by fire and faggot, compared with the destruction of female innocence; robbing woman of that priceless jewel,

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which leaves her a blasted ruin, with the mournful motto inscribed upon its frontals, "thy glory is departed?" Our sacked habitations may be rebuilt, but who shall repair this moral desolation? How many has it sent suddenly, with unbearable sorrow, to their graves?

In what has society a deeper concern than in the protection of female purity, and the marriage relation? The wife cannot surrender herself to another. It is treason against the conjugal rights. Dirty dollars will not compensate for a breach of the nuptial vow. And if the wife is too weak to save herself, is it not the privilege of the jury to say whether the strong arm of the husband may not interpose, to shield and defend her from pollution?

[4.] Finally, the Court charged the jury, "that whatever may have occurred on the night previous to the difficulty at the breakfast table, it could not amount to a justification or excuse for the act of shooting, the morning after the difficulty."

And this instruction was based, no doubt, upon the idea, that sufficient time had elapsed for passion to subside, and for reason to resume her sway.

In many cases this doctrine is true, but we cannot think it a sound proposition, under the facts and circumstances which surrounded these parties. The husband had heard and seen the personal indignity offered his wife the night before. He permitted Parish to escape, with threats of punishment should he remain in the city. The very next morning, at the breakfast table, he unblushingly resumes his seat in the immediate neighborhood of his intended victim. Was it human to keep cool in such a situation? To see the man who had attempted to desecrate the family altar, the night before, seat himself within two chairs of his wife! And was it not right and proper, in order to account for his violence, to give in proof to the jury, the occurrences of the preceding evening? To shut out the scene which transpired in the bed-chamber, is to deprive the jury of the power of appreci-

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ating the transport of passion kindled in the bosom of Biggs by the presence of Parish.

With our view of the law, we feel constrained to award a new trial in this case.

Judgment reversed.

ZACHARIAH DANIEL, plaintiff in error, vs. SEABORN POWELL,
et al., defendants in error.

- [1.] A next friend having obtained a decree in chancery securing a remainder interest to the minors for whom he acts, has an equitable lien on the estate which he has benefitted, for all proper expenditures of money made by him, but not for his personal services.
- [2.] The decree for his reimbursement should be so shaped as not to interfere with the preceding life estate, and to operate as a present lien upon the estate in remainder, to be enforced when the remainder falls into possession by the termination of the life estate.

In Equity, in Burke Superior Court. Decision on demurrer, by Judge HOLT, at May Term, 1859.

This was a bill in equity, filed by Zachariah Daniel against Seaborn Powell, James M. Melton, and Amanda, his wife, Homer Wimberly, and Mariah, his wife, John Powell, Mary M. Powell and Amarintha C. Powell, (the three last named defendants minors,) the object of which was to recover from defendants the amount paid out by complainant for counsel fees in and about the prosecution of a suit in their behalf; and also for services rendered by complainant himself, in the management of said suit and the litigation consequent thereon, as next friend of defendants. The fees paid out amounted to five hundred and seventy dollars, and the services per-

formed by complainant were alleged to be worth one thousand dollars.

To this bill there was a demurrer, on the following grounds :

1st. That complainant had a full and adequate remedy at law.

2d. That there was no equity in the bill.

3d. That the defendants were misjoined, the claim of complainant against them being several and not joint.

The Court, after argument and consideration, sustained the demurrer, on all the grounds, holding that the foundation of complainant's demand was an implied promise by defendants severally to pay for services rendered, and for money paid for their use, and that an action of *indebitatus assumpsit*, was a complete, and the proper remedy.

To which decision counsel for complainant excepted.

JOHN T. SHEWMAKE, for plaintiff in error.

MILLERS & JACKSON, *contra*.

By the Court.—STEPHENS J. delivering the opinion.

We think there is equity in this bill, and that the demurrer was improperly sustained. We think that the claim of the complainant is not a personal one against these minors, as was assumed by the presiding Judge, but is an equitable lien on the property. The minors made no contract, and were not capable of making any binding contract with him, to reimburse him for his expenditures in serving them as their next friend, by having their property secured to their enjoyment. He was acting for the benefit of their property, under the direction of a Court of Chancery, and the Court will see to it, that he receives proper compensation out of the property itself. The Court will never go beyond the property which he has benefitted, for that might lead to a compen-

sation beyond the service rendered. We think, however, that the complainant ought to have had the original decree, securing this property to the minors, so shaped at the time, as to provide for his compensation as next friend. It could have been done then without additional costs, and having failed to do it then, he must pay the costs of having it done now. Nor do we think he ought to be allowed any charges for personal services rendered by himself, for that would open a door for the office of a next friend to be turned into one of personal profit and speculation. But we do think that he ought to be allowed his charges on account of all proper expenditures of money made by him for the benefit of the property. The decree granting the relief to him ought to be so shaped as not to interfere with the existing life estate which precedes the estate of these minors, and ought to operate only as a lien upon their estate in remainder now, to be enforced when the property falls into possession by the termination of the life estate. One of the minors, who was a joint tenant in the remainder when the complainant's services were rendered, was dead when this bill was brought, and his estate is unrepresented. Any decree which may be rendered in the case can not bind his interest in the estate, though it may bind the others. The suggestion is thrown out to counsel for their consideration. We think also, that those of the remaindermen who are still minors, ought to be represented in this litigation by guardians *ad litem*. All of these suggestions point to defects in the form of the bill as it stands at present, but nevertheless, we think it is bottomed on a substantial equity, and ought not to have been dismissed.

Judgment reversed.

Dwelle, adm'r, vs. Roath, ex'or.

LEMUEL DWELLE, administrator, plaintiff in error, vs. DAVID L. ROATH, executor, defendant in error.

- [1.] A bill in equity filed by one who has the equitable title, for the purpose of enjoining several common law suits, at the instance of one who has the legal title, and ostensible right to recover possession of the property, will be retained to avoid circuity of action and unnecessary expense and litigation, unless it appears that there is a legal necessity for the common law actions to proceed—especially after a decree has been had settling the rights of the parties as the law fixes them.
- [2.] Upon the death of the wife, having a separate property, the title to such property vests in the husband; and that right is not lost to his representatives, although the husband failed to administer on his wife's estate during his lifetime.
- [3.] When the parties go to trial on the bill and answer, and there is no question of fact in issue, and there is nothing involved but a question of law, it is not improper for the Court to instruct the jury to sign a decree in accordance with the legal or equitable rights of the parties.

In Equity, in Richmond Superior Court. Decision by Judge HOLT, at May Term, 1859.

This was a bill in equity, by David L. Roath, executor of James Adams, deceased, against Lemuel Dwelle, administrator of Harriett L. Adams, deceased, to enjoin certain actions at law.

The facts of the case are these:

On the 15th day of September, 1842, James Adams, and Harriett L. Averell, (widow of ——— Averell, deceased,) in contemplation of their marriage, then shortly to be solemnized, entered into and executed a marriage settlement, in and by which it was agreed and covenanted, that certain real and personal estate therein mentioned, as the property of Mrs. Averell, shall, notwithstanding said marriage, "remain to the sole and separate use of the said Harriett L., as hereinafter provided. Now the said Harriett L. and James, for and in consideration of the premises, do hereby covenant and agree to and with each other, that if said marriage shall take place, that the aforementioned property, with the future issue, income and profits thereof, shall be entirely at the dis-

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position of and under the control of the said Harriett L., and shall remain to the sole and separate use of the said Harriett L., and be free from all debts, liabilities and contracts now existing against the said James Adams, 'or that he, the said James, may hereafter contract or assume. The said James further covenants and agrees to and with the said Harriett L., that she shall have full power and authority, at any time after the said contemplated marriage shall take place, to give, grant, sell, devise, or convey, all or any part of theafore mentioned property, or the future issue, income and profits thereof, unto any person or persons that she, the said Harriett, may think proper; and that the said Harriett L. shall exercise the same powers over said property, and the future issue, income and profits thereof, as though she were *feme sole*; and the said James further covenants and agrees to and with the said Harriett L., that he will join her in any conveyance that the said Harriett L. may make as aforesaid, in which she shall or may desire his concurrence, and that he will hold said property as her trustee, and not in his own right."

Shortly after the execution of this settlement, the marriage was solemnized, and the said James took possession of said property, and held the same as trustee until the death of his wife, who died without having made any disposition of said property by deed, will or otherwise. The husband survived his wife, and held, retained and used said property until his death, which occurred some years after the decease of his wife. He departed this life without having administered on his wife's estate, leaving his last will and testament, and therein devising and bequeathing said property as his own, and appointing David L. Roath his executor. Afterwards, Dwelle, the defendant, took out letters of administration on the estate of the said Harriett L., deceased, and he instituted actions at law—ejectment and trover—against Roath, for the lands and personal property contained in said marriage settlement. And to enjoin these suits this bill was filed.

It also appeared that Mrs. Adams had no children by her

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last husband, but that she had and left children surviving her first husband.

The Judge granted the injunction, and upon the coming in of the answer, counsel for defendant moved its dissolution upon the grounds—

1st. That there was no equity in the bill.

2d. If any, that it had been fully sworn off by the answer.

The Court refused to dissolve the injunction, but instructed the jury, to whom the cause had been submitted, to decree a perpetual injunction of the actions at law. To which refusal and instruction defendant by his counsel excepted.

GIBSON, by E. J. WALKER; and W. G. JOHNSON, for plaintiff in error.

MILLERS & JACKSON, *contra*.

By the Court.—LYON J. delivering the opinion.

[1.] There is much doubt as to the necessity of this bill, but as it avoids a circuitry of actions, the expenses of administration on this property, useless litigation, and quiets the titles to the property, it will be retained for these purposes, especially as it has been answered, issue joined, and a decree rendered properly settling the rights of the parties.

[2.] Upon the death of the wife, having a separate estate, the husband is entitled to administer and reduce the same to possession without account. The husband, in this case, being in possession of the property at his wife's death, and continuing to hold it up to his death, the right of his representatives to retain the property was not defeated by the failure of the husband to administer during his life. This question was distinctly settled in *Bryan vs. Rooks*, 25 Ga. 622.

[3.] As there was no dispute as to the facts, and the whole matter in issue a question of law, it was not improper in the Court to instruct the jury to sign a decree settling the rights of the parties under the law.

JOHN POURNELL and WIFE, plaintiffs in error, vs. DANIEL HARRIS, defendant in error.

[1.] A testator, by the sixth item of his will, made in the State of Virginia, in 1793, where he resided, made the following bequest: "I lend to my grand-daughter, Jincey Jordan, during her natural life, the use and services of the following slaves and their increase, to-wit: Edy, &c., (which said negroes I had lent to my son, Henry Haily, at my discretion,) and at her decease, I give the said slaves and their increase to the heirs of her body, lawfully begotten. But if she should die without such issue, in that case, I give the said slaves and their increase to my grand-children, Letitia and Richard Hyde Haily, aforementioned, or the survivor of them, and the heirs of their bodies, lawfully begotten. And in default thereof, then to my grand-sons, Henry and Hudson Haily, or the survivor of them, and their heirs forever."

Held, That Jincey Jordan took an estate tail in the negroes, which was enlarged by the laws of Virginia into an estate in fee simple.

[2.] That the word "*lend*," used in said clause, imports the same sense as "give," and is so to be construed.

[3.] That the gift of the *use and services*, in said item, carries the corpus of the property with the use.

Trover, from Washington county, Before Judge HOLT, at March Term, 1859.

This was an action of trover, by John Pournell and wife, and others, against Daniel Harris, for the recovery of certain negro slaves, claimed by the plaintiff under the sixth item of the last will and testament of James Haily, deceased, late of the State of Virginia, and which item is as follows, viz:

"*Item Sixth*. I lend to my grand-daughter, Jincey Jordan, during her natural life, the use and services of the following slaves and their increase, to-wit: Edy, Fortune, Rody, Ferriby and Littice, (which said negroes I had lent to my son, Henry Haily, at my discretion,) and at her decease, I give the said slaves and their increase to the heirs of her body, lawfully begotten. But if she should die without such issue, in that case, I give the said slaves and their increase to my grand-children, Letitia and Richard Hyde Haily, aforementioned, or the survivor of them, and the heirs of their bodies, lawfully begotten. And in default thereof, then to my grand-

sons, Henry and Hudson Haily, or the survivor of them, and their heirs forever."

This will was executed in the State of Virginia, where the testator resided at the time of his death, and bears date 26th March, 1793.

The plaintiffs claimed the negroes, as remaindermen, under the said sixth item, being the "heirs of the body of Jincey Jordan, lawfully begotten."

At the trial, on motion of counsel for defendant, the presiding Judge ordered a nonsuit, on the ground that the sixth item of said will created an estate tail in Jincey Jordan, which, by the laws of the State of Virginia, was converted into a fee simple estate, and vested an absolute title to said slaves and their increase, in said Jincey.

Afterwards, counsel for plaintiffs moved to set aside the judgment of nonsuit, and to reinstate the cause, on the ground that the Court erred in the construction given to the sixth item of said will.

The Court overruled the motion and counsel for plaintiffs excepted.

WM. S. ROCKWELL; and I. L. HARRIS, for plaintiffs in error.

JOHN SCHLEY; and GEO. A. GORDON, *contra*.

By the Court.—LYON J. delivering the opinion.

[1.] What interest or title did Jincey Jordan take in the negroes named in the sixth item of the will of James Haily, according to the laws of force in the State of Virginia, where the will was executed, and where the testator resided, and subsequently died in 1795? This is the question that this record presents for the adjudication of this Court; for by those laws, then in force in that State, must this Court be governed in construing and giving effect to this provision of that will.

By an Act of the Legislature of the State of Virginia, of 7th October, 1776, it is enacted, that "any person who now hath, or hereafter may have any estate in fee tail, &c., in any lands, and whether such estate tail *hath been or hereafter shall be* created by deed, will, &c., shall from henceforth, or from the commencement of such estate tail, stand *ipso facto* seized, &c., of such lands, &c., in full and absolute fee simple, in like manner as if such deed, will, &c., had conveyed the same in fee simple," &c. And by a revised Act of 1785, it is again enacted, "that every estate in land or slaves, which, on the 7th October, 1776, was an estate in fee tail, shall be deemed from that time to have been, and from that time to continue, an estate in fee simple. And every estate in lands which since hath been limited, or hereafter shall be limited, so that, as the law aforetime was, such an estate would have been an estate tail, shall also be deemed to have been, and to continue an estate in fee simple."

These are the statute laws of force in the State of Virginia, at the execution of this will, and by these laws, and the construction put on them by the Courts of Virginia, must the interest of Jincey Jordan in these negroes, under that will, be measured.

The Courts of Virginia, in determining what words in deeds or wills, made in that State since the passage of those Acts, create estates tail, and in construing and giving effect to the statutes themselves, have uniformly held, that they were bound by the same laws and rules of construction that prevailed in that State, and in the Courts of Great Britain. before the passage of the Act of 7th October, 1776, abolishing estates tail in that State, and converting them into estates in fee simple. *Jeggetts vs. Davis*, 1 *Leigh Rep.* 368; *Tate vs. Tully*, 3 *Call.* 354; *Eskridge vs. Fisher*, 1 *Hen. & Mun.* 559.

With a rule thus broadly defined, it would be an easy matter for us to determine what estate Jincey Jordan took in the property, under the will, even if the adjudication of the Courts of Virginia left room for doubt, but there can be no doubt; the cases are too numerous, and too directly in point.

In *Carter vs. Tyler*, 1 *Call.* 143, the will was made in 1759. Testator gave to each of two sons a tract of land, and to each devise was this limitation: "to him and his heirs lawfully begotten forever," "and if either of my sons should die without issue, my will is, that the whole go to the survivor; and if they both die without issue lawfully begotten, then my will is, after my wife's death, that the lands be sold, and the money thereon be equally divided between my daughters then living, and their heirs forever." In that case the Court held, that the sons took estates tail, and the limitations over were void. Judge Carr, of the Court of Appeals of Virginia, in *Bell vs. Gillespie*, and *Broadus vs. Turner*, 5 *Ran.* 281 and 309, refers to the decision approvingly, and says that it was decided in 1797, thirty years previously to *Bell vs. Gillespie*, and the first case to be found in the books after the passage of the laws docking entails, by the unanimous opinion of the Court, consisting of Pendleton, Carrington, Lyon, Fleming and Roane—venerable and able men—who were actors in those eventful scenes which gave birth to these laws. The cause was argued with great learning and ability, by the most distinguished counsel then at the bar, who put forth all their strength to prove that the limitations over were not destroyed by the statute; and that decision has never been questioned since.

In *Eskridge vs. Fisher*, 1 *Hen. & Munn.* 559—will in 1784—devise of land and *personal* estate to his son, and his heirs, and if he die without lawful heirs, to the grand-son of the testator—counsel insisted that as real and personal estate were devised by the same words in the same sentence, this case presented an important distinction; but the whole Court considering the case as settled, decided the estate of the first taker to be an estate tail.

In *Ball vs. Payne*, 6 *Ran.* 73, the words of the will in controversy were: "At the death or marriage of my wife, I give unto my son, Cyrus Ball, *the use* of the remainder of my lands

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that I possess in the county of Lancaster, during his life, and in case he should have heirs lawfully begotten, that he shall or may dispose of the said land to either, or amongst the said heirs as he shall think proper; but in case that my son should die without *such* heirs, then my will is, that the said lands be equally divided amongst my daughters." That case, and the one before this Court, are alike in many features—in the one case the *use* only of the land is given, in the other the *use* and *services* to the first taker; in the one case the limitation over is to the heirs lawfully begotten, and should the son die "*without such heirs*, then over," and in the other, the case before us, the limitation is "to the heirs of *her body* lawfully begotten," and "if she should die without *such issue*," then over, making, where there is a difference, this case much the strongest. In that case, after ruling that this was a devise to Cyrus for life, the Court says, there is no doubt but that the son Cyrus would, under that will, take an estate tail; according to the doctrines of the English law, or by the law of Virginia enlarged into a fee. For we know, says the Court, that by the law, as it has long been settled, if an estate had been given to A. for life, then to the heirs or issue of A., and if he die without such issue, over, A. took an estate tail; and this the statute says shall be a fee. But if we say, that under the law dispensing with words of inheritance, (referring to the Act of 1785,) the heirs of the body of A. became purchasers, and take the fee, we prevent A's life estate from being enlarged into a fee tail, and thus withdraw it from the Act. This would be setting one clause of the same Act in direct opposition to another. This, too, would violate the rule laid down and steadily adhered to by this Court, *in all the cases which have come before it*. Now when it is understood that this argument of the Court of Appeals of Virginia, was made directly in reply to the position of counsel for the plaintiff in that case as in this, that, under the will of James W. Ball, the heirs of the body of Cyrus Ball, and grand-children of the testator, were the

immediate objects of the intended bounty of the testator, and were used by the testator as words of purchase, and not of limitation, and that the Court should consider a fee simple given to the heirs of Cyrus Ball, which they took as purchasers, and which would prevent the enlargement of the estate of Cyrus into a fee tail, the striking analogy between the two cases is most manifest and conclusive. The Court concluded that Cyrus Ball took an estate tail, which was converted by the Act into a fee. Upon the authority of the case of *Ball vs. Payne*, consistent with, and sustained as it is by a uniform and unbroken current of decisions in that State, from 1797 down to the present day, we are of the opinion that Jincey Jordan took an estate tail in the negroes mentioned in the sixth item of the will of James Haily, converted by the law of Virginia into an estate in fee simple; in other words, that the property mentioned in that item of the will, vested under the will absolutely in her.

Counsel for plaintiff referred to, and relied on, in support of a contrary construction, the cases of *Timberlake vs. Graves*, *Greshams vs. Greshams*, *James vs. McWilliams*, and *Cordle vs. Cordle*, 6 *Mum.* 174, 187, 301, 455; but in none of those cases was the rule, enforced in this case, denied or controverted, nor the authority of the cases we have referred to, and by which we have felt ourselves bound, doubted or disputed.

[2.] But it is insisted, that as the testator made use of the word "*lend*" instead of "*give*," that no gift was intended to Jincey Jordan, and that no estate in, or title to the property of any kind, vested in her; but that the interest she had in the property, was simply that of a loan, while the title to the property remained in the testator during his life; and after his death, and until the death of his grand-daughter, in his executors; and if this position was a sound one, it would make a grand difference in our judgment. But is the position a sound one? We think not. The words of the bequest are, *I lend to my grand-daughter, &c., during her natural life, &c., and at her decease, I give, &c.* It would seem that as

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the testator used the word *lend*, to express the interest that he intended his grand-daughter should take in the property, and the word *give* to carry the property from her to the heirs of her body, or in default of them to others, he had some purpose in doing so. What that purpose was does not clearly appear. It certainly was not that the word *lend* should have its appropriate signification, for a loan is a grant of a thing to another for a limited time, to be specifically returned to its owner. It implies that the dominion of the thing remains in the lender. Here the testator parts with his entire interest in this property. No further control of the property is left in him or his executors; that is gone from him and them forever. Between the expiration of the life interest of Jincey Jordan, and the taking of the remaindermen, there is not one instant of time, in which the executor of testator could resume the possession or dominion. How then can it be a loan? Had the testator, instead of saying "I lend," said "I give," what greater interest would Jincey Jordan have taken in the property, than she actually did, or than the testator intended she should take? The interest given, and intended to be given, then, not being a loan but a gift; it must be construed to mean the same as if the testator had said "I give," instead of "I lend." This word was before the Court of Appeals of Virginia, for construction, in the case of *Deane vs. Hanford*, 9 Leigh, 256, in the following clause: "I lend to Thos. Deane, and the heirs of his body." Here, the Court says, "there is no sound distinction between such a loan, and words imputing a gift," and that authority is conclusive upon us in this case.

[3.] It is insisted further, that the negroes were not the subject of the gift to Jincey Jordan, but that only the "*use and services*," while the negroes are given to the heirs of her body, and that is such a distinction as takes this case out of the rule.

We cannot agree with counsel for the plaintiff. We think that if there is a distinction, it is without a difference. This identical question was passed upon by the Court, in *Ball vs.*

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Payne, 6 *Rand.* 73. There the testator gave the use of the land to his son Cyrus, with power of appointment to the heirs of his body, if he had any, and the Court says, "the use of his land given to Cyrus in the first branch of the clause, and the power of appointment in the second, I do not consider as affecting at all the character of the devise." But in the absence of any such adjudication in that case, can a case be found where, when the entire use and profits of a thing is given indefinitely, the thing itself does not follow the profits?

Judgment affirmed.

Judge STEPHENS having been of counsel in this case, previous to his elevation to the Bench, did not preside.

DOLLNER, POTTER & Co., plaintiffs in error, vs. BENJAMIN F. WILLIAMS, defendant in error.

- [1.] If one, after selling personal property, retains possession, and subsequently, and while in possession, executes a mortgage to a third person, to secure a debt, the lien of the mortgage must prevail over the previous sale, if the mortgage was not fraudulent, and the mortgagees had no notice of the former sale at, or previous to their taking the mortgage.
- [2.] The declarations of the mortgagor at, and previous to the execution of the mortgage, the mortgagees not being present, and assenting to such statements, are inadmissible to prove notice to them of the former sale or fraud in the mortgage.
- [3.] It is error in the Court to charge the jury on a state of facts not in proof.
- [4.] It is irregular in the Judge of the Court below in signing the certificate to the bill of exceptions required by law, to incorporate therein a statement of any additional fact or evidence not included in the bill of exceptions, or brief of evidence, filed in support of a motion for new trial; nor can this Court in passing upon the questions presented, consider such addenda as a part of the record.

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Trover, in Charlton Superior Court. Tried before Judge COCHRAN, at April Term, 1859.

This was an action of trover, brought by Benj. F. Williams, against Harold Dollner, Gilbert Potter, and John Camerden, partners, under the name of Dollner, Potter & Co., to recover a turpentine still and fixtures. Service of the writ was effected on Potter alone, and the action proceeded against him, under the provisions of the statute in such case made and provided.

Brief of testimony.

The plaintiff introduced the following testimony :

A bond for titles from Enoch Hannum to the plaintiff, dated the 12th day of May, A. D., 1855, upon proof of the hand-writing of the obligor.

John Brooks, being sworn, testified as follows: "That he had a conversation with Enoch Hannum at the time of the execution of a certain mortgage by said Hannum in favor of Dollner, Potter & Co., which he thinks was in June, 1855; that Hannum then said he had sold the turpentine still to the plaintiff; that Hannum asked him to go for a lawyer to draw a trust deed or mortgage for him (Hannum) to Dollner, Potter & Co., of all his lands, wagons, flatboats and other property, in order to give himself time to pay his debts, by preventing his other creditors from sacrificing his property under attachment or other process; that he found no lawyer, but got a form book, from which was taken the form of a mortgage which Hannum then drew and executed in favor of Dollner, Potter & Co.; that he included in the said mortgage the property he said he had sold to the plaintiff; that at a subsequent time he (the witness) had a conversation with defendant about the plaintiff's claim, but does not remember what it was. That in the spring of 1856, but not before, he (witness) saw plaintiff in possession of the place where the still was; plaintiff was there with his family.

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The still was worth, to the best of his knowledge, from \$1,000 to \$1,500; and might be worth \$200 per annum, but as to that the witness can hardly form an opinion."

On the cross-examination, the witness said: "That in his said conversation with Hannum, Hannum said his object in executing the mortgage was not to defraud creditors, but to secure them; that he was then indebted to Dollner, Potter & Co.; that neither defendant, nor any one of the firm, was present at said conversation, or at the execution of the mortgage; that he (the witness) did not see defendant until the spring of 1856; that he does not know that defendant, or any one of the firm, had any knowledge of the conversation with Hannum above mentioned, or of the execution of the mortgage, until he (the defendant) was in this county in the spring of 1856.

Curtis R. Hinton, being sworn, testified as follows: "He removed the still from Burnt Fort at the instance of the defendant; he found it on the place where the plaintiff was living; he removed it to Camp Pinckney, in this county, whence he thinks it was shipped to New York. The still was worth from \$1000 to \$1,500; its yearly use was worth nothing hardly, as it was out of order, the bottom being cracked. He thinks what he has stated took place in the latter part of 1856. Plaintiff may have been on the place seven or eight months."

On cross-examination the witness said: "The still had been sold by the Sheriff at the door of the Court House in this county. The plaintiff was present at the sale, but did not forbid it, or make any objection to it, or set up any claim to it, or give any notice that he claimed it, as witness heard; that no such notice was given by any other person; that the defendant bought the still at said sale, and employed him (the witness) to remove it; that the plaintiff was present when (he witness) removed the still, and asked only by whose orders he removed it, but made no objection to its removal, and set up no claim to it."

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The plaintiff here closed his case, and the defendant offered the following testimony :

A mortgage of said still from Enoch Hannum to Dollner, Potter & Co., dated the 7th day of June, 1855.

The affidavit of the defendant, as one of said firm, to foreclose the same.

The execution in pursuance thereof, with the entry thereon.

The Sheriff's deed to Dollner, Potter & Co.

John E. Bryant, being sworn, testified as follows : " That he sold the still in question as Sheriff of said county, as recited in his deed to the purchaser ; that he sold it himself ; that the plaintiff was present, and quite near him, and made no objection to the sale, and gave no notice of any claim to the still, and set up no claim to it, though he knew what was going on ; the still sold was lying at Burnt Fort, and was purchased by the defendant for about \$200, and delivered to him in pursuance thereof ; the levy was made by his predecessor in the office of Sheriff."

Stephen McCall, being sworn, testified as follows : " That he knew the still lying at Burnt Fort, once owned by Enoch Hannum, but knows nothing of the value of it ; was present at the sale of the still by the Sheriff, and plaintiff was there ; heard no notice given to the public of any claim to the still on the part of any person ; plaintiff made no objection to the sale, and set up no claim to it. *He knows the defendant ; he is a merchant doing business in the city of New York, in partnership with a Mr. Dollner and a Mr. Camerden.*"

On the cross-examination, he said " he never heard the defendant name the still in connection with the plaintiff."

Erasmus D. Tracy, being sworn, testified as follows : " That he was present when the still was sold ; it was sold as a still lying at Burnt Fort, and as the property of Enoch Hannum ; it was so announced by the Sheriff ; plaintiff was there, but gave no notice of any claim of his to the still, set

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up no claim to it, and made no objection to the sale, so far as witness heard."

Here the defendant closed his case, and *John Brooks*, being recalled by the plaintiff, said "he did not know whether the mortgage shown him was the mortgage Hannum spoke of executing, as stated in his examination in chief, but that it contained the articles Hannum spoke of including in it." He repeated what he stated then as to his conversation with Hannum, and added that Hannum said he wished to leave the State, and desired to make a trust deed or mortgage to some one, to prevent creditors from attaching and sacrificing his property; that his object was not to defraud his creditors, but to secure them; and that he included the property sold to Williams, in order to secure him also; that he preferred Dollner, Potter & Co., as he owed them; he also stated that when he saw defendant in the spring of 1856, he (the defendant) had heard of plaintiff's claim, and said he would try to compromise with him; this was after the mortgage but before the sale. Witness spoke to him of it, and he to witness."

The defendant objected to the testimony of John Brooks, the first witness for the plaintiff, as to the declarations of Hannum, concerning the sale of the still to plaintiff, as tending to alter, vary and contradict the written instrument; and also as to the declarations of Hannum, concerning his intentions in executing the mortgage to defendant.

The Court overruled the objection, and admitted the testimony, and defendant excepted.

The jury found for the plaintiff; whereupon, counsel for defendants moved for a new trial, on the following grounds:

1st. Because his Honor erred in admitting in evidence the sayings of Enoch Hannum, before the execution of the

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mortgage, to the witness, John Brooks, as to his having sold the still to the plaintiff.

2d. Because his Honor erred in admitting the testimony of the same witness, when he was recalled after the defendant had closed his case, to prove by the sayings of Enoch Hannum the intention of the said Hannum in making the mortgage to Dollner, Potter & Co., which had been read to the jury by the defendant.

3d. Because his Honor refused to charge the jury, as requested by counsel for defendant, that the jury were not to consider the testimony given, as to the sayings of Hannum at the time of the execution of the said mortgage, unless the defendant was present when such sayings were made, and acquiesced in the same, or afterwards acquiesced therein.

4th. Because his Honor refused to charge, as requested by counsel for defendant, that the bond for title given by Hannum to the plaintiff was but the evidence of a contract to be afterwards executed, and was no bar at law to the conveyance, by the obligor, of the property mentioned in the bond, or the execution of a mortgage thereon.

5th. Because his Honor charged the jury that it was not necessary for the plaintiff to prove that he had paid for the still in order to make out his title to the same, if sale and possession of the same were proved.

6th. Because his Honor refused to charge, as requested by counsel for the defendant, that if the plaintiff had not paid for the still in pursuance of the said bond, the said mortgage was a valid lien on the said still.

7th. Because his Honor refused to charge, as requested by counsel for the defendant, that if the defendant had no notice of the bond for titles, the said mortgage was a valid lien on the still; but did charge, on the contrary, that though it might have been a valid lien as against all other persons, it was not as against the said plaintiff, if there were proof of sale and delivery before the mortgage.

8th. Because his Honor, in charging as requested by coun-

sel for the defendant, that if the plaintiff stood by in silence at the Sheriff's sale and did not forbid the sale, or give notice of his claim, or take any steps to assert it, he was thenceforth barred from ever afterwards asserting any claim he might have had; qualified said charge by saying that he was not so barred as against the defendant, if the defendant had notice of the plaintiff's claim before the sale.

9th. Because his Honor refused to charge, as requested by counsel for defendant, that notice to the defendant of any claim set up by the plaintiff subsequently to the mortgage, even if prior to the sale, did not affect his rights under the mortgage.

10th. Because his Honor charged that the title of the defendant rests on the purchase at the Sheriff's sale, and not on the mortgage, which vests a lien and not title.

11th. Because his Honor charged that if the mortgage was affected with fraud, the purchase at the Sheriff's sale in pursuance of it vested no title; without qualifying the said charge by instructing the jury that knowledge of and participation in the fraud by the defendant was necessary to affect his rights under the mortgage.

12th. Because the charge of his Honor was contrary to law.

13th. Because the verdict of the jury was contrary to law.

14th. Because the verdict was decidedly and strongly against the weight of evidence.

15th. Because there was no evidence whatever to justify the verdict.

The Court overruled the motion for a new trial, and defendant excepted.

LAWTON & BASSINGER, for plaintiffs in error.

By the Court.—LYON J. delivering the opinion.

Was the Court right in permitting the witness, John Brooks, to testify to the statements made by Enoch Hannum at the time of the execution of the mortgage by him to Dollner, Potter & Co.? We think not.

At the time of the execution of this mortgage on the property in controversy by this issue, the mortgagor was in the possession of the same, notwithstanding he had previously sold and made a written bill of sale, or agreement in writing, for title thereto, to the defendant in error, Gilbert Williams.

As between Enoch Hannum and Gilbert Williams, this sale was good, and could have been enforced by Williams; but without a delivery of the property to Williams under that agreement, it was not valid as against the mortgage lien of the plaintiffs in error, Dollner, Potter & Co., which attached thereto immediately on the execution of the mortgage, while Hannum was in possession of the same, and before the title of defendant in error had completely vested by a reduction of the property to his possession; unless the plaintiffs in error, Dollner, Potter & Co., had notice at or previously to the execution of the mortgage, of the former sale to the defendant in error, or, unless the mortgage was fraudulent; that is, not taken by Dollner, Potter & Co. in good faith for the purposes therein specified.

To overcome this superior lien, or better right, of the plaintiffs in error to the property, it was incumbent on the defendant in error, Williams, to affirmatively show, either that Dollner, Potter & Co., had notice at the time of, or previously to the execution of the mortgage, of the former sale to Williams, or that the mortgagees took this mortgage in bad faith or fraudulently.

The declarations of Enoch Hannum, the mortgagor, as testified to by the witness, John Brooks, at and previously to the execution of the mortgage, were offered to prove one or both of these facts; they were not admissible for either

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purpose, that is, to prove notice, or show fraud, for the reason, that the persons to be affected by such declarations, Dollner, Potter & Co., were not present, and assenting to the truth of such statements, which would be necessary before they would be evidence against them; hence the Court ought to have rejected these statements. It was argued by counsel for defendant in error, that, inasmuch as Dollner, Potter & Co. were not present at the execution of the mortgage, but that Hannum had the mortgage prepared, and executed it himself in their absence, he is to be regarded as their agent. Not so. For all that we know, this mortgage was prepared and executed by Hannum, under an express agreement between himself and the mortgagees, that he would do so to secure his indebtedness to them, and in the absence of any explanation whatever of the circumstances, we would presume such to be the fact. Now, it would be strange, if one, in the literal fulfilment of his agreement with these parties in executing this mortgage, could charge it at the time, by his mere declarations, with such notice, or fraud, in the absence of those to whom the mortgage was given, as would defeat the object of the deed entirely; for this would be the effect of the admission of this sort of evidence. See what injury might result from it. Concede that Hannum was indebted to Dollner, Potter & Co. in this large amount, looking on this mortgage as ample security for their debt, they take no steps to coerce its payment, relying upon this property as their only security; and when they attempt to avail themselves of its benefits, they are met and defeated by statements of which they were ignorant, and which had no foundation in truth.

It is urged again, that they are admissible as parts of the *res gestæ*; that is true, and it would be for that reason that they would be admissible against the deed itself, if Dollner, Potter & Co. had been present, and admitted the truth of the statement, or if it was important to enquire into Hannum's reasons for making this mortgage, but it is not; for however

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fraudulent may have been his intent in making the mortgage, yet if Dollner, Potter & Co. were no parties to such fraudulent intent, but took the mortgage in good faith, to secure a *bona fide* debt from Hannum to themselves, then the deed is good, and not affected by the fraud of Hannum. So the Court erred in admitting this evidence against the objection of counsel for plaintiff in error, and ought to have granted a new trial in said cause, for the reasons given above, on the first, second, third, fourth, ninth, tenth and thirteenth grounds of the motion for a new trial.

There was error in the charge of the Court as made in the fifth ground of new trial, for the reason that there was no evidence of possession of the property in defendant in error before the Court, previous to the lien of mortgage, to support such charge.

And in the charge as made in the seventh ground, because there was no proof of the delivery before the mortgage.

The charge as made in the eleventh ground of new trial was erroneous, because there was no evidence of any fraud in the mortgage, (the statements of Hannum, as testified to by Brooks, being out of the way,) and that, therefore, was a question that ought not to have been left to the jury.

The Court had under consideration the charge of the Court below, set out in the eighth ground of new trial, as to the effect of the defendant in error, standing by in silence at the Sheriff's sale of this property under the mortgage *fi. fa.*, and when the same was purchased by plaintiffs in error, and not forbidding the sale, giving notice of his title, or taking any steps to assert it. This question we do not now decide because counsel for defendant in error have requested us not to do so, and for the additional reason that there is other property involved in the litigation, not now before this Court, between these parties, that may be affected by a decision of this point, and as that question has been but slightly argued, we leave that an open question.

A question of practice was made and argued in this case,

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which grow out of this fact: The presiding Judge, in signing this bill of exceptions, made an addenda of certain other evidence, which he certifies was had on the trial, but which was not incorporated in the brief of evidence, which had been previously approved by the Court, and filed to support the motion for new trial.

Counsel for plaintiffs in error insist that this additional evidence incorporated in the Judge's certificate to bill of exception was irregular, and ought not to be considered by this Court, as a part of the record of the cause in the Court below, and we agree with the counsel. The Court below in considering a motion for new trial, must confine itself to the brief of evidence, as allowed and filed, and, in signing the certificate required by law, cannot add any additional fact, not incorporated in the bill of exceptions or brief of evidence, and when he does so, this Court can not consider it as forming any part of the record. It is proper here to add, that the additional facts certified to by the Judge, if regularly before the Court, could not possibly have affected our judgment.

Judgment reversed. .

WILLIAM B. MILLER, plaintiff in error, vs. WILLIAM WOODARD, defendant in error.

- [1.] The warrant for a survey of land upon an application under the head rights laws of this State, must be sufficiently certain, in its description of the lands to be surveyed, giving "the buttings and boundings," so that the surveyor can identify and enter upon the particular lands to be surveyed from the description given in the warrant.

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[2.] Upon the trial of a caveat to an application for a grant of lands, in the Superior Court, after the warrant for survey has been rejected by the Court for an insufficient description of the land, under the statute, such application can not be aided or sustained by proof of any external facts, such as that the applicant is in possession of the land surveyed, or that he has, since the issuing of the warrant, obtained a grant for the same land, on a former application, but the whole proceeding should be dismissed.

Caveat to survey and grant of land, in Emanuel Superior Court. Before Judge Holt, at September Term, 1859.

This was an application by William B. Miller, under the head rights laws for a survey and grant of a certain parcel of land in Emanuel county, under a warrant issued by a Justice Court of said county, in favor of Berryman Doughtey, and by Doughtey assigned to Miller. The warrant bears date 4th June, 1853, and authorizes and requires the county surveyor to admeasure and lay out a "tract of land which shall contain one thousand acres in said county, adjoining lands of W. B. Miller and others, taking special care that the same has not heretofore been laid out to any other person or persons," &c. This warrant was assigned and transferred by Doughtey to Miller, 23d August, 1853.

To this application, Woodard entered his caveat and objected to said survey and grant on the grounds:

1st. That the warrant to one Henry Warner, which had been transferred to caveator, for the same land, was of older date than the warrant under which Miller was proceeding.

2d. That Miller had already granted more land than by law he was entitled to grant.

This caveat was traversed by Miller, who answered that said land was his property; and further, that said land was granted to him on the 12th day of December, 1853, it having been surveyed by the county surveyor, the 28th February, 1839, and that he had been in the peaceably and legally acquired possession of the same since that time until the filing of this caveat, and being so in possession he submits and

claims that he has the right to survey and take out a grant for the same, and that caveator has no rights in the premises.

The case being submitted to the jury, caveator moved to strike out all that portion of Miller's answer which relied on his possession and grant to have and maintain his right to said survey and grant, which motion the Court refused.

Counsel for Miller then offered in evidence the warrant under which he had his last survey made, being the warrant issued by the Court of Justices aforesaid. To the introduction of which caveator objected, on the ground that it did not contain a sufficient description of the land to be surveyed. The Court sustained the objection and excluded the warrant, and counsel for Miller excepted.

Miller then offered said warrant as color of title, together with proof of possession of the land. Caveator objected. The Court sustained the objection, and excluded the evidence, and counsel for Miller excepted.

Miller then offered in evidence a plat and grant from the State to himself, dated 12th December, 1853, (the warrant dated 7th January, 1839, and surveyed 28th February, 1839,) and which covered the premises in controversy. To the introduction of which caveator objected, and which objection the Court sustained and repelled the testimony, and counsel for Miller excepted.

The Court thereupon dismissed the case, and gave judgment against Miller for the sum of eighty-one dollars and ninety-two cent. costs. To which order and judgment counsel for Miller excepted.

WM. B. GAULDEN, for plaintiff in error.

JOHN SCHLEY, *contra*.

By the Court.—LYON J. delivering the opinion.

On the trial of the caveat in the Court below, we think it

was right in rejecting the warrant of survey. The description of the lands intended to be surveyed, as expressed in the warrant, was "a tract of land which shall contain one thousand acres in said county, adjoining lands of W. B. Miller and others." This description was not a sufficient compliance with the Act of 1783, *Cobb's Dig.* 667, requiring that the warrant to survey land under head rights shall describe the buttings and boundings of the land as particularly as may be. The object of the statute was that the warrant should contain such a description of the lands intended to be surveyed as would identify them; that the record to be made by the Clerk of the application, "*specifying the buttings and boundings of the land contained in the same,*" should amount to something more than a mere notice that an application had been made, and a warrant issued; that the record should give such description of the particular lands, for the survey of which the warrant issued, as would give other persons notice of what lands were intended to be surveyed; and of course the record could only follow the warrant. The warrant is an essential link in the chain of events to the obtaining a grant, and the description must be sufficiently certain to enable the surveyor to enter upon the particular tract authorized to be surveyed, and intended to be granted; the description given in this warrant is not sufficient for any purpose; the land to be surveyed adjoins land of W. B. Miller and others. What others? who is in the possession or occupation of any lands that adjoin the tract to be surveyed? This warrant does not show. Concede the fact that Miller owned but one tract, and was in the possession of that, on which side of him does the tract intended to be surveyed lie? Is it north, south, east or west? The warrant is silent. But suppose that Miller owned a dozen or more tracts in different parts of the county, which one of the tracts must this adjoin? And if the warrant is good in this case, it would be in any other. So we say that the description in the warrant did not answer the require-

ments of the statute, and the Court did right to reject it. And the warrant being rejected the whole proceeding was disposed of.

The offer of the applicant to prove that he was in possession of the land surveyed, might have been a circumstance to aid the application before the justices, and to have been inserted in their warrant, but it was improper to cure or aid a defective warrant.

Neither could the offer to show that a grant had already issued to this applicant, on a different application, remedy the difficulty. This latter application was a proceeding to obtain a grant for certain lands, and it must stand or fall on its own merits; and so must the grant already issued. If that grant was a good one, this proceeding was unnecessary, and ought to have been dismissed; if it was not a good one, it should not be allowed to aid in procuring one that would be good. The warrant for a survey must stand or fall on its own merits; as it was issued by the tribunal appointed by law for that purpose, it cannot be amended or supported by any collateral or outside circumstance in another Court.

The case itself, is of no importance, and the parties themselves entitled to but little consideration from the Court, as from the facts of the record, one of them is an intermeddler in a matter in which he had no interest; and the other is interrupting the Court with an application for lands, for which according to his own account, he has already a grant from the State; and for this reason Judge STEPHENS is of the opinion that the costs (the only thing now in controversy) ought to be divided between them. But as the case is now out of Court, and no error has been committed in disposing of it, we will let it remain out.

Judgment affirmed.

 Cartledge, guardian, vs. Cutliff et ux.

JOHN CARTLEDGE and WIFE, plaintiffs in error, vs. JOHN M CUTLIFF and WIFE, defendants in error.

[1.] Elcey Jones, a *feme sole*, possessed of an estate of land and negroes, in her own right, being about to marry, makes a marriage settlement, by which the whole estate is conveyed absolutely and irrevocably to a trustee, for the support and clothing of herself and family (in which is included Mary S., an infant daughter by a former marriage, so long as she continued single and a member of the family) and at the death of the said Elcey, the estate to go to certain named children by a former marriage. The marriage takes place, and the husband takes possession of the property embraced in the marriage settlement, and becomes by appointment the guardian of the infant Mary S. who was entitled to a considerable estate in her own right.

Held, That the provision in the marriage settlement for the clothing of Mary S. while she remained a member of her mother's family, and previous to her intermarriage, was good as an executed trust, and a Court of Equity will compel its execution in her favor.

[2.] That the guardian, having possession of such settled estate, was bound to provide the clothing of his ward out of that trust estate, instead of the ward's independent estate.

[3.] A guardian is entitled to at least two and a half per cent. commissions on all interest that accumulates in his hands, on balance in his hands due the ward, notwithstanding his failure to make any statement thereof in his annual returns.

[4.] A guardian who, in his answers to a bill filed against him for an account, appends a statement of the annual balances due by him to the ward, with a calculation of interest credits, or showing what he estimates the balance to be is not entitled to have such statement or calculation to go to the jury as evidence, *if for any purpose*.

[5.] An allegation in an answer, not in response to any charge in the bill, and unsupported by proof, is not to be considered by the jury as evidence.

In Equity, in Columbia Superior Court. Tried before Judge HOLT, September Term, 1859.

This case came before this Court, and was heard upon the following bill of exceptions:

JOHN M. CUTLIFF and WIFE,	}	Bill for discovery and settlement.
vs.		
JOHN CARTLEDGE and WIFE,		

Be it remembered, that at the September Term of said

Cartledge, guardian, vs. Cutliff et ux.

Court, on the eighth day of said month, and during said Term, in the year eighteen hundred and fifty-nine—the Honorable William W. Holt, presiding Judge of said Court—the above stated cause, being an equity proceeding, by John M. Cutliff and Mary S., his wife, former ward of the defendants, against John Cartledge and Elcey, his wife, as former guardians of the said Mary S., and for discovery, account and settlement of said guardianship, and there being a special jury regularly empaneled to try the issue between the parties, and the parties being each represented by counsel—

1st. The counsel for the complainants insisted, before the Court and jury, that the sums of money charged by defendants, (as by their annual returns, and appended to the bill,) against the complainant, Mary S., for clothing during her infancy, should not be allowed; because, that by an antenuptial contract between the defendants, which was also exhibited to the bill, and by which John W. Reid was constituted agent or trustee, the support and maintenance of the ward was provided for out of the trust estate of the said Elcey, which was settled to her use, excluding the marital rights of the defendant, John.

The defendant, John, by his answer, and before the Court and jury by his counsel, insisted and contended, that the trust estate of his wife never yielded any income or profit, but was inadequate to the support of the family charged upon it, and that he, defendant, had annually to advance the deficits of the estate from his private resources; but that during the time contemplated by said settlement, in which the said Mary S. was to have been a beneficiary under the same, she with the rest of the family had her full share of such articles as were prepared at home, and her board, lodging, &c.; the articles purchased and charged to her, by the guardian, being such as were not manufactured at home, and there being no funds of the trust estate to purchase them, and “that the defendant, John, being the guardian, and having the funds of the ward in hand, was liable for the support, maintenance,

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&c., of the ward, and for the payment of the same out of the funds in his hands." And so counsel for defendants asked the Court to charge the jury; which charge, as asked, the Court refused to give, but in lieu thereof charged the jury: "That if they found a fund in the hands of the said John, chargeable with the support, &c., of the ward, the defendant was bound to have discharged those expenses from said trust, and not from the funds of the ward in his hands." To the refusal of the Court to give said charge as asked, and the said charge as given by the Court, counsel excepted.

2d. In the further progress of the trial of said issue, the defendants contended, "that if the trust estate of the defendant, Elcey, was liable for the clothing of the complainant, Mary S., that estate should be pursued in the hands of the trustee;" and so asked the Court to charge the jury; which said last named charge, as asked, the Court refused to give; and in lieu charged, "that if the jury found from the evidence, that there was a fund in the hands of the defendant, John, belonging to said trust estate, he was bound to pay for the clothing of the ward, Mary S., from the trust estate, and not from the funds of the ward, in his hands as guardian." And to which refusal to give said last named charge, as asked, and the giving of said charge as mentioned, in lieu thereof by the Court, counsel for defendants excepted.

3d. In the further progress of the trial of said issue, before the Court and jury, counsel for the defendants contended and insisted, "that the defendant, John, was entitled to a commission of not exceeding ten per cent. on all interest made on the funds of the ward, in his hands as guardian, and that it was not absolutely necessary that he should have returned in his annual returns, the amount of interest for each year; and that under the circumstances, the jury might allow commissions on interest, not exceeding ten per cent.," and asked the Court so to charge; which said last charge, as asked, the Court refused to give, and in lieu thereof charged the jury, "that commissions on interest, made by a guardian, on funds

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loaned out, not exceeding ten per cent, nor less than two and a half per cent, might be allowed to guardians, and of which statements were made in their annual returns to the Court of Ordinary; but not in such a case as the one then at issue, where there had been no statement of the same in the returns." And to which last mentioned refusal to give the charge as asked, and to the charge as given in lieu thereof, by the Court to the jury, the counsel for defendants excepted.

4th. And in the further progress of the trial, the counsel contended, that the defendants being called on for an account and showing of their actings and doings, with a discovery as to the same, as guardians for the said Mary S., "that the original and amended answers, with the exhibits to them annexed, were responsive to the bill, and as such were proper evidence to be submitted to the jury; one of said exhibits containing a recapitulated statement of the interest made on funds of the ward; and the amended answer setting forth the loan by the guardian, of all funds which came to his hands, of the ward, and the crediting her with interest on the same." Which said last named charge as asked, the Court refused to give to the jury, and in lieu thereof charged the jury, "that the facts set forth in said amended answer, and in said exhibit to the original answer, were not evidence to be considered by the jury, further than the same appeared by the returns to the Court of Ordinary, and were mere allegations by defendants, which were required to be sustained by proof." And to which refusal to give said last named charge, as asked, and the giving of the charge in lieu thereof, by the Court to the jury, counsel for the defendants excepted.

J. C. & C. SNEAD; and MILLERS & JACKSON, for plaintiffs
in error.

R. TOOMBS; and WM. M. REESE, *contra*.

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By the Court.—LYON J. delivering the opinion.

John Cartledge and his wife Elcey, previous to their intermarriage in 1836, executed an antenuptial settlement, in which, after enumerating the wife's property, intended thereby to be settled and secured, and constituting John W. Reid, trustee and agent of the said Elcey, is to be found the following provisions, "in whom (the trustee and agent) it is intended that all of the above property, its interest and value, shall absolutely vest in law, *irrevocably*, to be by him used for the furtherance of its value, *reserving* to herself, family and other family, as he added to hers, including Rebecca Cartledge and Jane Cartledge, when not boarded out, and their clothing while in single state, a competent and decent support during her the said Elcey Jones's natural life; at her death the above property, its increase and value shall be divided equally between her children by a former marriage, to-wit: James Pace, Susan Avery, and Lavinia Pace." At the time of the execution of this settlement, Mary S., a daughter by a former marriage with one William Jones, and one of present complainants, was an unmarried infant, and member of the family of the said Elcey, and within that provision of her mother's marriage settlement, *which relates* to the clothing and support of her family while she remained single, out of the property embraced within the marriage settlement; she also possessed an independent estate which she derived from her father William Jones's will.

After the marriage of plaintiff in error, John Cartledge became the guardian of Mary S., and so continued up to her intermarriage with John M. Cutliff, and, as guardian during the time, managed and controlled the property that belonged to her, and made annual returns of the receipts and disbursements by him, showing the balance he admitted in his hands at each return, but made no statement of the interest accumulated on such balance, or how the funds in his hands were employed. Amongst other articles of charges against

Cartledge, guardian, vs. Cutliff et ux.

his ward, returned and allowed by the Court of Ordinary to his credit as guardian, were different articles of wearing apparel, purchased for Mary S. his ward, while she was a *feme sole*, that amounted in the whole to some six or seven hundred dollars. This bill was filed by John M. Cutliff and his wife, Mary S., against the plaintiffs in error, for an account, as former guardian of the complainant, Mary S., and in the bill they charge in substance, that all the charges made by Cartledge, as guardian, against the said Mary S., while his ward, for wearing apparel, were improper charges, and ought not to be allowed him in this account, because she was entitled, under the marriage settlement between him and her mother, to have her clothing out of the separate property of her mother, embraced in the marriage settlement, all of which was in his hands, and had been from its execution and that it was the duty of the said Cartledge, as her guardian, to see to it, that she got the benefit of that provision in her favor, and, having supplied the clothing, he had no right to reimburse himself out of her independent property, but to look alone to that estate in his hands which was so charged for her benefit.

To this charge, the plaintiffs in error, after admitting the marriage, the marriage settlement, the guardianship, and charges for clothing, &c., respond, denying that complainants or either of them had, or ever could take, any interest or rights in or through the same, (the marriage settlement,) and they insist that if any of the provisions of said contract have been violated by said John, (which is denied,) it is not for the complainants to call him to account therefor, but if liable to any person or persons, it would be to John W. Reid, trustee for his wife, and to the remaindermen.

Defendants further answering, say, that the trust estate yielded no income for the payment of these charges, but that it was an expense to the defendant, John. Here the parties were at an issue. The case was submitted upon the bill and answer, to which was appended a copy of the re-

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Court of Ordinary of Columbia county, as guardian for complainant, Mary S.

in error, by their counsel, requested the jury:

"That the defendant, John, being the guardian, and having the funds of the ward in hand, was liable for the support, maintenance, &c. of the ward, and for the payment of the same out of the funds in his hands."

"That if the trust estate of the defendant, Elcey, was liable for the clothing of the complainant, Mary S., that estate should be pursued in the hands of the trustee."

We do not know that we exactly comprehend what was meant by plaintiffs in error, in the first request, but under the pleadings, and as the question was argued before us, we understand the object to have been to deny the right of complainant, Mary S., to her clothing out of the separate estate of her mother under the marriage settlement, although that estate was in her guardian's hands at the time, and although it was expressly provided in the marriage settlement, that she should have her clothing from this estate; on the grounds taken in the answer:

1st. That the said Mary S. being a volunteer under that marriage settlement, and not within the influence of the marriage consideration, could not ask for an enforcement of any provision contained in it for her benefit.

2d. Because the trust estate yielded no income or profits to cover this charge.

This understanding of the first request, certainly covers the whole issue on that point.

The Court refused the request, and charged, "that if they found a fund in the hands of the said John, chargeable with the support, &c. of the ward, the defendant was bound to have discharged these expenses from said trust, and from the funds of the ward in his hands."

Was there any error in the refusals of the Court to charge

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as requested, or in the charge as made by the Court to the jury, under the circumstances of this case then in issue?

We think that it is true that the complainant, Mary S., although a child of the settler, Elcey, by a former marriage, was not within the consideration or influence of the marriage between the plaintiffs in error, and whatever provision was made in that marriage settlement for her, she takes as a *volunteer*, for, it is well settled, that the only persons within the scope or influence of the marriage consideration, are the wife, and the issue of the marriage.

As a volunteer, will this Court enforce the provision created by that settlement, for her benefit against these parties who made the settlement? And that question depends entirely upon another question, that is, whether the trust or provision for the benefit of this complainant is executed or executory.

If the antenuptial conveyance in favor of Mary S., as one of the family, between the plaintiffs in error, was incomplete in its terms, and was, by reason thereof, inadequate to vest the rights and provisions therein intended to be vested and secured to the different persons named, or in other words, required or contemplated some other act to be done as a strict settlement, or new conveyance to carry out, and complete the expressed intentions of the parties making the same, and was, by reason thereof, executory, then it is settled law, that a Court of Equity will not, on the application of one like complainant, who is a volunteer, and not within the influence of the marriage consideration, lend its aid to enforce a performance of such intention in her favor.

On the other hand, if the trust created by this marriage contract for the benefit of Mary S., the complainant, is an executed one; that is, if the right is fully and completely vested in her by the instrument itself, and nothing more is, or was necessary to be done to secure the same, or was contemplated by the parties, at the execution of the same, to be done, in order to secure this benefit to her, then a Court of

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turns made to the Court of Ordinary of Columbia county, by plaintiff in error, as guardian for complainant, Mary S.

The plaintiffs in error, by their counsel, requested the Court to charge the jury:

1st. "That the defendant, John, being the guardian, and having the funds of the ward in hand, was liable for the support, maintenance, &c. of the ward, and for the payment of the same out of the funds in his hands."

2d. "That if the trust estate of the defendant, Elcey, was liable for the clothing of the complainant, Mary S., that estate should be pursued in the hands of the trustee."

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vision in this settlement for the complainant, Mary S., the effect of our decision would be to defeat the whole purpose of this settlement, except the provision for the support of the wife during life; and before we did this, the case would have to be a very plain one. But viewing this conveyance as an actual legal settlement, and it is so, beyond all question, its limitations and provisions are good against the settlers, (*Atk. on Mar. Sett*, 144,) and they have no means of annulling it. *Ib.* 183-4, and cases cited.

But it is objected further, that the separate property of the mother, out of which this provision was to come, did not yield a sufficient income for that purpose; to this we answer, that this fact does not appear to be so. The answer of defendants in this particular not being in response to any charge in the bill, and not supported by any proof, the defendants were not entitled to the benefit of that objection.

Speaking for myself, however, I can say, that I see nothing in the marriage settlement, that limits the right of clothing and support out of this property of Mrs. Cartledge and her family, to the income or profits derived from its use. The remaindermen are not more the objects of this settlement, than are the wife and her family. They stand on no better footing; are only to take what is left after the property has subserved these objects for which it was first appropriated.

It follows from this view of the marriage settlement, that the complainant, Mary S. had a right to have her clothing out of this separate property of her mother, and having this right, it was the duty of the plaintiff in error, John, as her guardian, to secure to her the benefit of that right, and having done so, he cannot reimburse himself for such expenditure out of the funds in his hands belonging to the complainant, but must look alone to the separate estate.

Nor is it necessary for the complainant to follow that trust estate in the hands of the appointed trustee, for it is not there, nor has ever been. Had the property been in his hands while these charges were being incurred, and he had

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refused to pay them, then it would have been the duty of the plaintiff in error, John, as the guardian of complainant, to have compelled him to do so.

The charge of the Court, that commissions on interest made by a guardian on funds loaned out, not exceeding ten per cent., nor less than two and a half per cent., might be allowed to guardians, and of which statements were made in their annual returns to the Court of Ordinary, but not in such a case as the one then in issue, when there had been no statement of the same in the returns, "excluded the guardian from all commissions on the interest account, and was in conflict with the construction put by this Court on 11th section of the Act of February 29, 1764, in *Royston vs. Royston*, decided at Macon, June Term, 1859; it being the opinion of this Court, that the guardian is entitled to a commission of at least two and a half per cent. on all sums of interest, with which he is chargeable, whether any statement thereof has been made in his returns or not. That charge was therefore erroneous, but as two and a half per cent. for paying out this interest, was all that the plaintiff in error was entitled to, and all that he was deprived of by this charge, and as \$13,000 covers the amount of interest estimated by the jury against him in their verdict, as was conceded by counsel for both parties in the argument before us, the complainants must remit from the amount of the finding, two and a half per cent. on said amount of \$13,000, which is \$325, and thus reduce the verdict to that extent, or a new trial must be granted on this ground; but if complainants remit this amount of \$325 from the verdict and decree as rendered in this cause, then the judgment of the Court below for the balance of said verdict must stand affirmed.

Counsel for plaintiffs in error, further requested the Court to charge, "that the original and amended answers, with the exhibits to them, were responsive to the bill, and, as such, were proper evidences to be submitted to the jury, one of

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the exhibits containing a recapitulated statement of the interest made on the funds of the ward, and the amended answer setting forth the loan by the guardian of all funds which came to his hands, of the ward's, and the crediting her with interest on the same;" the Court refused so to charge, but did charge "that the facts set forth in the amended answer, and in said exhibit to the original answer, were not evidence to be considered by the jury, further than the same appeared by the returns to the Court of Ordinary; and were mere allegations by defendants which were required to be sustained by proof."

Upon a careful examination of the original and amended answers, we find that the only effect of this refusal and charge as made, was to exclude from the jury as evidence, the allegation in the amended answer, that "all sums of money received by him for, and on account of the said Mary S., as her guardian, were loaned out by defendant from time to time, and the interest received thereon accounted for in his return to the Court of Ordinary." This allegation was not in response to any allegation in the bill, and was supported by no proof beyond the returns, and in that case the jury were directed by the Court to consider the allegations as evidence. Another thing excluded from the jury as evidence by this direction, was a statement of the annual balances, as shown by defendants, together with the amount of interest due on each balance as calculated by defendant to the bill. In other words, it was a calculation prepared by defendant or his counsel, of what he admitted was the balance due by him to complainants, or rather what the complainants were due to him, for I believe, by this calculation, he brings them in debt to him.

To ask that such a statement or calculation should go to the jury at all, even as pleading, was asking a great deal, more, indeed, than I think he was entitled to; for it was calculated to, and might have misled the jury; but to ask that the jury should take that *ex parte* calculation as evidence

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was too much. There was no error in refusing the request, or in the charge as made.

So the judgment must be affirmed, provided the complainants remit from the amount of the decree the sum of \$325 for commissions on the \$13,000 interest; if the complainants fail or refuse to do this, then a new trial must be granted on that ground.

Judgment affirmed, on conditions.

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ABATEMENT.

See *Actions*, 1, 2.

ACTIONS.

1. An action of deceit, being necessary in form *ex delicto*, dies with the defendant. *Newsom, ex'or, vs. Jackson*, - - - - - 61
2. Whether it dies with the plaintiff? Query. *Id.*
3. An action was brought on an instrument in the following words: "\$177. On or by the 25th Dec., 1855, I promise to pay B. J. Wilson, or bearer, one hundred and seventy-seven dollars, with interest from date, this 19th June, 1859, for value received; said note to be paid out of a certain note I have this day traded to said Morrison, on L. B. Perryman, when collected, due at the same time as the above. J. J. MORRISON." There was no evidence that the Perryman note had been collected, or that it might have been collected by the use of due diligence.
Held, That a nonsuit was right. *Wilson vs. Morrison.* 269
4. If plaintiff calls two days before the time when bacon is to be delivered, at the request of defendant, and is told that it will not be delivered, because it has been

sold to others, no further demand is necessary. *Foster et al. vs Leeper et al.* - - - 294

5. When one white man employs another to work for him, it is not an implication or incident that the employer shall pay the employee's physician's bills; it would require an express contract to create that obligation. *Sweet Water Man. Co. vs. Glover,* - 399

6. A defendant may be sued in the same action in his two characters, of executor of the maker of a promissory note, and of individual endorser. *Roark et al. vs. Turner,* - - - 455

See *Attachment*, 1.

ADMINISTRATORS AND EXECUTORS.

1. An administrator is not entitled to commissions on property turned over by him to a distributee. *Ex parte Burney, adm'r,* - - - 33

2. A judgment against an administrator for a certain sum to be paid out of specific assets in his hands, concludes him as to the application which is to be made by him of those assets. Any other application of them is a waste, and in a suit against him or his representatives for such waste, it is no defence to show that there are other creditors of the first intestate. *Davies vs. Flewellen et al., adm'rs,* - - - 49

3. Where the intestate has an estate only for his life, no interest in the property can pass to his administrator, and the administrator can have no right to bring suit for the property, but that right must be in others. *Sawyer, adm'r, vs. Flemister,* - - - 347

4. Where property left by a testator to his children has been fraudulently disposed of, by collusion between the executrix and the purchaser, the legatees may file a bill

in their own name, against the purchaser, the executrix having died insolvent, and there being no representative upon her estate, or the estate of the testator.
Bledsoe vs. Bledsoe et al. - - -

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5. A will gave certain slaves to the testator's wife, for her life, with remainder to his children. The wife relinquished her life estate to the children, and divided out the negroes among them—she being the executrix. She died, and an administrator *de bonis non* succeeded her. He brought trover for some of the negroes.

Held, That the relinquishment of the life estate, and the distribution of the negroes among the remaindermen, was evidence of assent to the legacy, and therefore, that the executrix, as well as her successor, the administrator *de bonis non*, was divested of all right to the slaves, and therefore, that he was not entitled to recover in the action. *Perkins vs. Brown*, - - -

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6. In passing upon rival applications for letters of administration, by two persons standing equal in blood to the intestate, the facts that one of the applicants has been advanced to the extent of his full share in the estate, and is setting up an adverse claim to property which was in possession of the intestate at the time of his death, are facts which ought to be admitted in evidence, and considered. *Moody vs. Moody*, -

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7. The executor of a will is the proper administrator of the whole estate, as well of that part of which the will does not dispose, as of that disposed of by the will. *Venable vs. Mitchell*, - - -

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8. The next of kin of an intestate divided out his whole estate among themselves, according to the rule prescribed by the statute of distributions. Afterwards, an administrator was appointed. He failed to make any returns of any sort, to the Court of Ordinary. One of

heirs applied to that Court to have him removed for this failure.

Held, That if there was no debts, the division by the heirs was a good administration of the whole estate, although such division was the act of executors *de son tort* ; and therefore, that there was no estate of the intestate left, about which any return could be made ; and, consequently, that the failure of the administrator to make any return, was not a sufficient cause to authorize his removal. *Harris, adm'r, vs. Seals et ux.* 585

See *Guardian and Ward*, 4, 5, &c.

AGENTS, COMPENSATION TO.

A person who collects funds of a debtor, for the joint benefit of himself and other creditors, ought, when that fund is distributed by a Court of Equity, to be allowed reasonable compensation for the services of himself and lawyers, to the extent to which those services are productive and beneficial. *Price vs. Cutts et al.* - 143

AGREEMENTS, REFORMATION OF.

A written marriage contract is subject to be rectified by the verbal contract which it was to reduce to writing, in every case in which not allowing it to be so rectified, would be to allow one of the parties to it to perpetrate a fraud on the other. *Durham et ux. vs. Taylor, ex'or,* 166

ADVERSE POSSESSION.

1. A sale of lands made in the face of an adverse possession is void. *Helms vs. May,* - - 121
2. A possession originating in and continued under a mistake or misapprehension as to the true line which divides two lots of land, will not ripen into a statutory title. *Howard vs. Reedy,* - - - 152

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3. Possession under another is adverse to every body but that other under whom it is held.

AMENDMENTS.

When enough appears upon the face of a bill to suggest to the Court that the complainant is entitled to relief, provided the proper allegations were made, leave will be granted for that purpose. *Wynne et ux. vs. Alford, ex'or,* - - - - - 694

APPEAL.

1. An appeal from the Court of Ordinary, like an appeal in other cases, carries up the whole case for a new hearing on all the legal evidence that can be produced, whether such evidence has been produced on the first trial, or is first offered at the appeal trial. *Moody vs. Moody,* - - - - - 519
2. An appeal from a confession of judgment, reserving the right of appeal, is good, although no juries were in attendance on the Court at which the confession was made. *Melins, Currie & Sherwood et al. vs. Horne,* 536

ARREST, EXEMPTION FROM.

Suitors are exempted from arrest while going to, attending on, or returning from Court. Nor does the fact that one of them resides out of the State, and who has had his adversary arrested, under bail process, previously, justify a departure from the practice. *Henegar vs. Spangler,* - - - - - 217

ARBITRATION AND AWARD.

1. An award will not be set aside on account of newly discovered testimony, when the party has shown no diligence to obtain it. *Dulin vs. Caldwell & Co.* - 362

2. A case pending in Court may, by the agreement of the parties, be arbitrated under the Act of 1856. *Id.*
3. An award, under the Act of 1856, can only be impeached for fraud and corruption in the arbitrators. *Id.*
4. Where a case is pending in Court, all matters germane to it may be introduced by way of amendment of the pleadings, and be then adjudicated along with the original matter, or the whole referred to arbitration, and the award made the judgment of the Court, according to the Judiciary Act of 1799. *Barksdale, adm'r, et al. vs. Green,* - - - - - 418
5. A controversy, *not in suit*, was referred to the arbitration of *two* persons, with power to them to choose a third, *as an umpire*. The two made an award, without having chosen an umpire, and one of the parties moved that the award should be made the judgment of the Court.
Held, That as the arbitration was not under either the Judiciary Act of 1799, or the Arbitration Act of 1856, there was no power or authority in the Court to make the award the judgment of the Court. *Halloran vs. Bray,* - - - - - 422
6. A case was referred to three arbitrators, in which one of the defences was the statute of limitations. The arbitrators, on one piece of paper, made an award in favor of the plaintiff in the case, and on another, a statement that one of their number dissented from the award, on the statute of limitations.
Held, That the last paper was to be received as evidence on the question whether the arbitrators had decided the defence of the statute of limitations.
Held, secondly, That the paper being received as evidence, it showed that that question had not been decided by the arbitrators, and therefore, that the award

ought to be rejected. *Cameron et al. vs. Castleberry et al.* - - - - - 495

7. In an arbitration, if evidence prejudicial to one of the parties gets before the arbitrators, without the knowledge of that party, and is considered by the arbitrators, and the award is against that party, the award ought to be set aside. *Id.*

8. If one award is dependant on another, and the latter falls, it carries with it the former. *Id.*

ASSIGNEES.

The assignee of a chose in action, not negotiable, takes it subject to all the equities which existed between the assignor and the maker. *Jack, for another, vs. Davies,* 219

ATTACHMENT AND ATTACHMENT BONDS.

1. The defendant in an attachment, has no right of action against the plaintiff in the attachment, for wrongfully suing out the attachment, unless that was done with malice and without probable cause; and, in such action, when brought, the *onus* is upon him, the plaintiff in it, to show that the attachment was taken out with malice, and without probable cause. *Sledge vs. McLaren,* - - - - - 65
2. Attachment does not lie on a promise to pay a certain amount in solvent notes, *before* such promise is *due*. *Monroe vs. Bishop,* - - - - - 159
3. Attachment bonds are amendable in matters of form under the Attachment Act of 1856. *Oliver vs. Wilson,* 642
4. Where an attachment issues on the ground that the defendant absconds, a traverse of the fact is not obnoxious to objection because it sets forth a place where the

defendant was publicly living when the attachment issued. *Id.*

5. On the trial of such a traverse, the burthen of proof is on the plaintiff in attachment. *Id.*

ATTORNEYS AT LAW.

1. If one of the attorneys for the plaintiff in judgment collects the judgment, the others may, by *motion* against him, enforce their liens on the money for their fees. *Smith et al. vs. Goode, et al.* - - - 185

2. One of several of the attorneys for plaintiffs in a judgment, collected money on the judgment, and was ruled by the other attorneys for so much of it as would pay their fees. He was properly served with the rule. Two of the plaintiffs in the judgment came in and defended the rule in his place. They appeared by another attorney, and he urged against the motion, amongst other things, that his clients had not sufficient notice of the motion. He did not say he was not ready, did not ask for time, or suggest any thing to call for delay. The Court overruled the objection.

Held, That the Court did right. *Id.*

3. He then requested that the case might be tried by a jury.

Held, That this request ought to have been granted. *Id.*

4. Knowledge of a matter was acquired by an attorney at law, from the plaintiff, during the existence of attorney and client, between him and the defendant.

Held, That he was competent to testify concerning the matter, as a witness for the defendant. *Thompson vs. Wilson*, - - - - - 539

BAIL.

1. That a *fi. fa.* is the first execution issued in a bail case, does not discharge the bail. *Aycock vs. Leitner*, 197

2. In a bail case, the Sheriff was the bail and the *sci. fa.* was directed to Coroner, and the Sheriff acknowledged service of the *sci. fa.* and waived service of it by the Coroner, or any other officer.

Held, That even if the direction was wrong, this acknowledgment and waiver cured the error. *Id.*

3. Since the new bail Act of 1857, giving sureties the right of having their principals bailed immediately, the surety has no necessity to resort to a *ne exeat* against his principal. Bail accomplishes the same purpose, and the remedy on the common law side of the Court being equally adequate, a resort to equity will not be sustained. *Ross vs. Hawkins, adm'r*, - - - 261

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. When the maker of a note offers it in evidence to prove that he has paid it off, it is incumbent on him first to prove that the paper which he offers is the one which was in circulation. *Mygatt, for another, vs. Pruden*, - - - - - 43

2. Whenever a protest is not required, notarial expenses cannot be recovered. *Johnson vs. Bank of Fulton*, 259

3. In a suit on a promissory note by the endorsee against the endorser, the recovery cannot be reduced by showing that the endorsement was made on a sale of the note for a less sum than that expressed in the face of the note and claimed in the suit. BENNING J. dissenting. *Roark et al. vs. Turner*, - - - 455

4. A note though given on Sunday, and given in a work not of "necessity or charity," is yet, not within the Act of 1762, for keeping holy the Lord's day, and other purposes, if it be made otherwise than in the exercise of the "ordinary callings" of the parties to the note. *Sanders vs. Johnson*, - - - 526
5. A letter written by the drawee to the drawer after the draft has been endorsed, and payment refused, although by its terms a sufficient acceptance, yet it is not without other proof available as such to the holder. *Lugrue vs. Woodruff*, - - - 648

BILLS OF EXCEPTIONS.

1. Service of a bill of exceptions on counsel who procured the decision brought up for review, although he may say he had *ceased* to be counsel before he was served, is good service. He *can't* cease. *Clark et al vs. Pigeon Roost Mining Co.* - - - 99
2. It is irregular in the Judge of the Court below, in signing the certificate to the bill of exceptions required by law, to incorporate therein a statement of any additional fact or evidence not included in the bill of exceptions, or brief of evidence, filed in support of a motion for new trial; nor can this Court, in passing upon the questions presented, consider such addenda as a part of the record. *Dollner, Potter & Co. vs. Williams*, - - - 743

BONDS, BREACH OF

A bond was conditional, to be void, if the obligors paid a note endorsed by the obligee, "so that, in no event, it" should "be collected, or attempted to be collected, from" him.

Held, That a collection of the note, from him, or an at-

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tempt at it, was essential to constitute a breach of the condition. *Franks et al. vs. Hamilton*, - - 141

BOND.

An instrument with a scrawl annexed to the signatures, is a bond, without purporting to be such upon its face. *Harden et al. vs. Webster, Parmelee & Co.*, - - 427

BOND FOR TITLES.

A bond for titles with the purchase paid, is not good against a subsequent conveyance to a purchaser for value, without notice, and whose deed of conveyance has been recorded in due time. *Allen vs. Holding et al.* 485

CA. SAS.

When the Term to which a *ca. sa.* is returnable, is adjourned to another day, a return of the *ca. sa.* to the adjourned Term, will be regular, and will serve as the return required, before a *sci. fa.* against bail can be issued. *Aycock vs. Leitner*, - - - 197

CERTIORARI.

Where the Justices of the Inferior Court issue execution against the County Treasurer, and his securities, improperly, *certiorari* is not the remedy—such Justices not being a Court. *Jus. Inf. Court vs. Hunt et al.* 155

CHARGE OF THE COURT.

1. The Judge is justified in giving a charge respecting the credibility of a witness who discloses on the stand the fact that he has been guilty of the *crimen falsi*. *McDaniel vs. Walker*, - - - 266

2. When there is evidence enough to authorize such a charge, there is enough to sustain a verdict adverse to the credit of the witness, it would be error to present to the jury the opportunity of finding a verdict which could not stand when found. *Id.*

3. It is error to charge the jury that circumstances can not outweigh positive testimony. *Bowie & Co. vs. Maddox et al.* - - - - - 285

4. It is error to charge the jury, that a deed of gift to a slave is superseded by a subsequent purchase from the same person, without notice of such deed of gift, in a case where there is no evidence of a purchase from the same person, and where the deed of gift had been recorded within twelve months after it was made—such record being equivalent to actual notice to the subsequent purchaser by our Act of 1838. See *Cobb's Dig.* page 176. *Landrum vs. Russell,* - - - - - 405

5. H. C. L. held the titles to the one-half of a tract of land that T. E. B. had bought and paid for, to secure himself against loss, on account of T. E. B's half of the expenses that might be incurred in the erection of a mill on said land, that they were building in partnership. On a bill filed by T. E. B., to compel a conveyance to him, from H. C. L., of his part of the land, alleging that his share of the expenses had been fully paid to H. C. L., it was no error in the Court to charge the jury, on the trial, "that even if they found that complainant had not paid the defendant one-half the expenses of erecting the mill on the premises, they might still decree against the defendant, a specific performance of the contract, to convey a moiety of the land and improvements to complainant; at the same time requiring complainant to pay one-half the said expense, or so much thereof as they might find unpaid

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and due the defendant ;" but such charge submitted the question on which they were to pass, on its merits, fairly to the jury. *Long vs. Brown*, - - 628

6. It is error to charge the jury that if a debtor is once shown to be absconding, he continues so until his creditors get notice of his new residence. *Oliver vs. Wilson*, - - - - - 642

7. Where there is no evidence of an absconding, except in the manner of leaving a place, it is error to charge the jury as to what may constitute an absconding afterwards, upon the assumption that there may have been no absconding in the leaving. *Id.*

8. When the parties go to trial on the bill and answer, and there is no question of fact in issue, and there is nothing involved but a question of law, it is not improper for the Court to instruct the jury to sign a decree in accordance with the legal or equitable rights of the parties. *Dwelle, adm'r vs. Roath, ex'or*, - - 733

9. It is error in the Court to charge the jury on a state of facts not in proof. *Dollner, Potter & Co. vs. Williams*, - - - - - 743

CLAIMS, &c.

1. When suit is brought against the claimant on his forthcoming bond, it is too late to insist that the appeal was not regularly entered in the proceedings, in which the property was found subject. *Harden et al. vs. Webster, Parmelee & Co.* - - - 427

2. In a suit upon a forthcoming bond, the execution under which the levy was made, is not only relevant but indispensable testimony to make out the case. *Id.*

3. When the forthcoming bond in reciting the execution varies, slightly, from the *fi. fa.* itself, it is a mere question of identity, for the jury to pass upon; or, if it is evidently a mere clerical mistake, the Court itself perhaps, would have the right so to determine. *Id.*
4. In claim cases, where there is a legal affidavit of claim, and also a legal claim bond, a forthcoming bond is not necessary to the hearing of the claim—and the claim will not be dismissed upon the ground, that the Sheriff has turned over the property to the claimant without taking a forthcoming bond. *Bonner vs. Little*, - - - - - 538
5. When a claim is interposed and returned to the Court for trial, the proper disposition of it is by a verdict of the jury, unless withdrawn or dismissed by the claimant. *Hodges, trustee, vs. Holiday et al.* - 696

CONTRACTS.

1. A contract by one to let another have accounts to a certain amount off of books that are specified, gives that other a right only to select such accounts as he may please, and not to have good accounts at all events. He may have good ones if he can find them on the books; and there is no breach of the contract, unless this right of selection is refused to the promisee. *Jordan vs. Rivers*, - - - - - 137
2. A promise to pay a part of the debt of another in discharge of the whole, has no consideration to support it, unless that other be a party to the new contract. *Whelan vs. Edwards, et al.* - - - - - 315
3. When a draft is drawn upon one, who is styled Treasurer, &c., of an unincorporated Mining Company,

and the drawee accepts individually, it may be treated by the holder as his personal contract. *Lallerstedt vs. Griffin*, - - - - - 708

CORPORATIONS, POWERS OF MUNICIPAL.

1. A clause in the charter of the city of Albany, conferring the power in general terms, to pass all by-laws, &c., not inconsistent with the Constitution and laws of the State, does not confer the power to pass an ordinance making it a penal offence to sell spirits in quantities of a quart or more, to be drank on the premises where sold, this being inconsistent with the State law on the same subject. *Adams vs. The Mayor of Albany*, 56
2. A. took out a license from the State, to retail spirits in Gordon county, in November, 1858. In December thereafter, the Legislature passed an Act authorizing and empowering the Common Council of Calhoun, in said county, to levy and collect a tax, not less than one hundred dollars, upon any retail establishment, &c., in that place.
Held, That the statute was not intended to apply to one who had already paid the State for the privilege of retailing. *Chastain vs. Town Council of Calhoun*, 333

CRIMINAL LAW.

1. The practice of *striking* a jury in petty offences, where the accused is allowed seven *challenges*, and the State five, is now too well settled as an equivalent for challenging, to be overruled as an inadmissible practice in that particular class of cases. *O'Byrne vs. The State*, - - - - - 36
- Where there is evidence going to impeach a witness, it is error in the presiding Judge, after giving a charge as to the effect of impeaching evidence, then to express

a doubt whether such charge is applicable to the case.
Id.

3. On the trial of a person charged with burning a jail, the citizens of the county are competent jurors. *Philips vs. The State*, - - - - 105
4. When the Sheriff or his deputy are disqualified to summon a jury, the Court may order any disinterested person to summon one. *Id.*
5. When a house is consumed by fire, and nothing appears but that fact, the law rather implies that the fire was the result of accident, or some providential cause, than of a criminal design. *Id.*
6. If there are two persons of the same name, and one of them signs that name to notes, with the intention that the notes may be used in trade, as the notes of the other, it is a forgery. *Barfield vs. The State*, - 127
7. The 1st, 9th and 14th sections of the seventh division of the penal code will, perhaps, each apply to the case of obtaining goods by passing a forged note. An indictment was founded on the 14th.
Held, That as that was the latest section, and as the punishment it prescribes is the lightest, it, at least, was operative. *Id.*
8. Under an indictment for keeping a gaming house, defendant does not relieve himself by showing that he had rented out the house before the gaming was done, when it appears that the house was in his possession when the gaming occurred. *Scott vs. The State*, 263
9. A defendant on the criminal side of the Court is entitled to a continuance of his case, when it is called within a few days after the alleged offence, and he puts in an affidavit stating material evidence, which he

- avers to be in possession of witnesses who are out of the county, and whom he had no opportunity to subpoena. *Metts vs. The State*, - - 271
10. An indictment under the Bastardy Act, will not lie in one county, when the child was begotten and born in another, and when the putative father was arrested, brought before the Magistrate, and refused to give bond in the latter county. *Huff vs. The State*, - 124
11. The defendant may justify his act in carrying away a negro from the adverse peaceable and legally acquired possession of another, by showing the consent of the true owner. *Drumright vs. The State*, - 430
12. He cannot justify himself by the consent of one who he *thinks* is the owner, unless he be either the true owner, or some other person who truly has, and not merely professes to have, authority to grant such consent. *Id.*
13. It is not error for the Judge to refuse to have talesmen again called, in making up the panel in a criminal cause, after he has ordered the Sheriff to direct each talesman to come into Court, and had had proclamation made that all talesmen were required to come into Court. *Lingo vs. The State*, - - - 470
14. That which is perfectly justifiable on the part of the deceased, cannot be any legal provocation to the slayer. *Id.*
15. Where a copy presentment appears from the minutes of Court to have been established in lieu of a lost original, and the defendant is tried on a paper which purports to be the original,
Held, That it does not appear from the whole record, that the paper was not the original; for the paper itself, which is a part of the record, purports to be that original

which was once lost, its presence purporting that it has been found. *Rheinhardt vs. The State*, - 522

16. A general order from the owner, overseer or employer of a slave, to a vendor of spirits, requesting him to let the slave have spirits in reasonable quantity, whenever he wants it, is no justification for furnishing any quantity, however small. *Id.*

17. In an accusation of murder, where the defence turns upon the grading of the homicide, the Judge can not withhold from the consideration of the jury, any of the grades put in issue, either by the argument or the requested charges; but all of the grades so put in issue, ought to be submitted to the jury, along with proper instructions as to what constitutes each grade. *Jones vs. The State*, - - - - - 59

18. In grading the homicide, the jury may consider the drunkenness of the accused, at the time of the killing, not to excuse, or mitigate, or extenuate his crime, but to assist them in deciding, when there was a provocation, whether the intention to kill preceded the provocation, or was produced by it. *Id.*

19. The penalties imposed by the Act of 23d December, 1833, "to prevent the drawing of lotteries, or sale of lottery tickets, in the State," for a violation of its provisions, can not be enforced by indictment. *Swan vs. the State*, - - - - - 616

20. Upon an application for continuance by the accused, although the Court determines the showing a good one, yet if counsel for the State admit in writing the facts expected to be proved by the absent witnesses, before the case is actually continued, it is no error for the Court then to refuse to continue the case, and proceed with the trial. *Pournell vs. The State*, - 681

21. When the jury have been selected to try the cause, and four of them sworn, and one of the remaining jurors excused by the Court for sickness, it is not error in the Court, after causing the panel to be filled, to require the list again to be stricken over, and the cause to proceed. *Id.*
22. It is not necessary or proper to declare a mistrial on account of the sickness and excuse of one of the selected jurors, unless the jury have been previously charged with the case. *Id.*
23. If to kill another with a gun, pistol, or other like instrument, would, under the circumstances, be justifiable homicide, under the penal code, the failure to kill will not subject the party to the offence of shooting at another, under the Act of 1856. *Biggs vs. The State.* 723
24. If a man takes the life of another who attempts the seduction of his wife, under circumstances of gross and direct aggravation, it is for the jury to find whether the case stands upon the same footing of reason and justice, as other instances of justifiable homicide enumerated in the penal code. *Id.*
25. When the injured husband meets one, the next morning, who has attempted, over-night, the violation of his marriage bed, and fires upon him, it is right and proper to give in evidence the previous occurrence, as a justification or excuse for the act. *Id.*

DAMAGES.

1. The failure to deliver property on the day of sale, and within the hours of sale, is a forfeiture of the forthcoming bond; and notwithstanding the property is subsequently taken into custody by the Sheriff, it is not necessarily a discharge of the bond; but damages may be recovered for any expense which has been incurred by

reason of said failure, as well as the depreciation in the price or value of the property, between the first and second day of sale. *Giddens, use of, &c., vs. Dismukes et al., adm'rs,* - - - - - 110

2. Where a party rescinds a contract on account of fraud, and seeks damages also, his measure of damages is not an equivalent for the violation of parts of the contract by the other party, but it is an equivalent for the hurt he has received for being inveigled into the contract. *Atlanta and LaGrange Railroad Co. vs. Hodnett,* - - - - - 461

3. Where a party seeks damages for the violation of a contract by the other party, the measure of his damages is not what he has suffered by performing his part, but what he has suffered by the failure of the other party. *Id.*

DEEDS.

An instrument conveying property *in presenti*, and having all the requisites of a deed, and delivered by the maker to the Clerk, to be recorded as such, is not testamentary in its character, notwithstanding it declares that the property is not to go into the possession of the donees, till the death of the donor; especially as the paper would be ineffectual as a will, being attested by two witnesses only. *Moye et al. vs. Kittrell, adm'r,* 677

DEEDS, PROBATE AND REGISTRY OF.

1. An affidavit of a subscribing witness to a deed, that he saw the feoffor "assign" it, is not sufficient to authorize the record of the deed; and a record made on such an affidavit is a mere nullity—is no evidence of any thing, but is mere hearsay. *Doe, ex dem., vs. Lewis, tenant, &c.* - - - - - 45

2. A deed purporting to be signed, sealed and delivered, in the presence of two witnesses, was admitted to record upon the affidavit of one of them, that he saw the grantor sign, seal and deliver the deed at the time, and for the purposes therein mentioned; that he saw the other sign the same as a witness, and that he signed the same as a witness also—each in the presence of each other.

Held, That the probate was sufficient. *Green et al. vs. Glass et al.* - - - - - 246

3. A deed recorded after the lapse of twelve months from its execution, is good against another deed from the heirs at law of the same grantor, the last being recorded within twelve months after its execution, but not executed till after the first had been recorded. *Anderson vs. Dugas*, - - - - - 440

3. A power of attorney, under which a deed is made, is a muniment of title, and may be recorded along with the deed; but its record is not necessary to the validity of the record of the deed. *Id.*

DIVORCE AND ALIMONY.

1. The power of granting temporary alimony belongs to the Superior Court, as an incident to its jurisdiction over divorces, and not to the Judge. He cannot exercise it in vacation; and the husband is entitled to notice and a hearing before it is granted in Court. *Goss vs. Goss.* - - - - - 109

2. Attachment, and not *feri facias*, is the proper mode of enforcing an order for alimony. *Id.*

3. In a libel for divorce, founded on desertion, evidence going to show that the desertion was not "willful," or that the plaintiff was consenting thereto, is admissible for the defendant. *Word vs. Word.* - 281

4. Where the husband has a clear estate of twelve thousand dollars, twenty-five dollars per month is not excessive temporary alimony for the wife, nor is five hundred dollars excessive counsel fees for her, she having been of high character previously, and her character for chastity being attacked by the defence. *Collins vs. Collins*, - - - - 517
5. Confessions of parties against themselves are admissible in a libel for a divorce, when there is no suspicion of collusion. *Johns vs. Johns*, - - - 718
6. In a suit for divorce, the fact that the plaintiff had a friendly interview with his wife, and requested her to return home and live with him, does not amount in law to a condonation of the libel. *Id.*
7. To a libel for divorce, on the ground of cruelty in the wife, she may recriminate the adultery of the plaintiff, her husband. *Id.*

DRUNKENNESS.

See *Criminal Law*, 17, 18.

EASEMENT.

The owner of the land on which the city of Griffin stands, laid it out into streets, squares, and lots, some of the latter for building lots, some for public purposes, some for churches; according to plan. Afterwards, the owner sold the building lots at auction, and caused it to be proclaimed at the sale, that the lots were sold according to that plan. Deeds were made to the purchasers, but nothing of the matter stated in the proclamation, was put into them. Afterwards, ten months or more, the owner made a deed in fee, to the Baptist

church, for the lot set down in the plan for the Baptist church. In this deed, nothing was said, as to preventing the Baptist church, from using the lot for other purposes than those of worship. The Baptist church was not, by agent, or otherwise, present at the auction. The Baptist church entered on the lot, erected a house of worship, and, some time afterwards advertised a part of the lot for sale, with a view to raise money to build a better house of worship on another part of the the lot. Certain lot owners in the city of Griffin, filed a bill against the church, to prevent it from so doing. They claiming, that they had, in the facts aforesaid, an easement in the lot, that it was never to be used for any other purpose, than that of a place of worship.

Held, That the facts were not sufficient, to give them a title to such easement. *Chapman et al. vs. Gordon et al.* - - - - - 250

EJECTMENT.

1. Dudley drew a lot of land. Before the grant issued, he conveyed the land by a warranty deed, to Swift, and received from Swift, the purchase money, and Swift took, and by himself or his assigns, kept possession. After the grant issued, Dudley conveyed the lot, by deed, to Hardman—Swift, or one of his assigns, being at the time of the conveyance, in possession. This younger deed was never recorded. Hardman brought ejectment on this younger deed.

Held, That he was not entitled to recover. *Lessee of Dudley et al. vs. Bradshaw, tenant in possession*, 17

2. In ejectment there can be no recovery of the premises upon a demise from a dead lessor, but there may be a recovery of *costs* on such a demise, if the lessor be living at the commencement of the suit, though dead at the time of the trial. *Doe ex dem. vs. Lewis, tenant, &c.* - - - - - 45

3. If, in ejectment, there is a demise from A. and a demise from B., and the evidence brings the title into A., and then shows a deed from A. to B. there ought not to be a nonsuit, whether the deed from A. to B. be void or not. *Prescott et al. vs. Jones et al.* - 58

4. Adverse possession of land is notice of the holder's title to all persons who purchase during its continuance. *Helms vs. May*, - - - 121

5. A sale of lands made in the face of an adverse possession is void. *Id.*

6. One joint tenant cannot maintain ejectment against another, unless the defendant does something which amounts to a disclaimer of the title of his co-tenant, or which is inconsistent with his right of property, in the premises. *Lawton et al. vs. Adams*, - 273

7. A conveyance of land by one, against whom the land conveyed was held adversely by claim of title, is void. *Cain & Morris vs. Monroe*, 23 Ga. Rep. 82, overruled. *Gresham vs. Webb & Williams*, - - - 320

8. Complaint in ejectment not amendable by striking out the old plaintiff and substituting another in his place. *Neall vs. Robertson*, 18 Ga. Rep., affirmed. *Id.*

9. To authorize a plaintiff in ejectment to use the name of a third person, as lessor, he must show that he has a *bona fide* subsisting claim to the premises, and that there is a connection between his title and that of the party upon whose demise he seeks to recover; or that he has the authority of that person, in whom the paramount title is vested, to institute the suit in his name. *Adams vs. McDonald*, - - - 571

10. To defeat the plaintiff in ejectment, the defendant may show a paramount title outstanding in another, without connecting his possession with that title. *Sutton vs. McLeod*, - - - - - 589

EQUITY, JURISDICTION.

1. Where a common-law suit is pending, and the defendant in it, files a bill in the same county, against the plaintiff, who resides in a different county, asking relief and injunction, the jurisdiction is good for the injunction, but not for the relief. *Key & Sheffield vs. Robison*, - - - - - 34
2. Equity will not aid a plaintiff in *fi. fa.*, to remove a cloud from a portion of defendant's property, when there is plenty of other unincumbered property out of which the money can be made. *Billing vs. Rutherford, Receiver*, - - - - - 38
3. If the remedy by habeas corpus is adequate, equity ought not to interfere. *Massey vs. Sneed*, - 51
4. A bill by a wife, alleging that her husband, who was deeply in debt, had negroes, derived from her by marriage, going to sale under executions, and alleging an agreement under these circumstances on the part of her and her husband on the one side, and her brother on the other, that her brother should buy the negroes at such sale, and after reimbursing himself for his outlay, in pursuance of the agreement, should then convey the negroes to a trustee for the wife and children; and alleging that the brother has bought the negroes at prices which were greatly reduced by his making it known that he was buying for the benefit of the wife and children; and alleging further that he has reimbursed all his outlay made in pursuance of the agree-

- ment; and asking a full and specific performance of that agreement on his part—is a good bill. *Gilmore vs. Johnson*, - - - - - 67
5. And in such case the complainant is entitled to any overplus of *hire*, after allowing the brother all proper reimbursements for his outlay in pursuance of the agreement. *Id.*
6. A perfect equity cannot originate in a contract utterly void by law. *Gresham vs. Webb & Williams*, 320
7. A bill in equity filed by one who has the equitable title, for the purpose of enjoining several common law-suits, at the instance of one who has the legal title, and ostensible right to recover possession of the property, will be retained to avoid circuity of action and unnecessary expense and litigation, unless it appears that there is a legal necessity for the common law actions to proceed—especially after a decree has been had settling the rights of the parties as the law fixes them. *Dwelle, adm'r, vs. Roath, ex'or*, - - - - - 733

EQUITY, PLEADING AND PRACTICE.

1. A question of contested right of possession cannot be settled by an order at chambers, on the affidavit of one party and without notice to the other. When such an order has been passed in favor of the complainant in a bill, and then the bill dismissed by complainant without the knowledge of defendant, the latter has the right to have the case reinstated in order to have the first illegal order set aside. *Clark et al. vs. Pigeon Roost Mining Co.* - - - - - 29
2. When one party has read in evidence part of a sworn bill, it is the right of the other party to read such other

- parts as illustrates the same issue. *Davis vs. Flewellen et al. adm'rs*, - - - - - 49
3. It is no error to allow a complainant to give evidence in mere diminution of the defendant's proof, although the bill contains no allegation covering the evidence so introduced by complainant. *Gilmore vs. Johnson*, 67
4. It is not too late, under our equity system, to purge an answer of impertinence or scandal, after replication filed. *Royston et ux. vs. Royston, adm'x*, - - - 82
5. One witness and circumstances sufficient to give a clear preponderance against the answer, will suffice to overcome the answer. *Durham and wife vs. Taylor, ex'or*, - - - - - 166
6. A defendant in chancery can not use his answer as evidence for himself in another case, further than he could in the original case, and not in either, unless it appears to be responsive to the bill. *Daniel vs. Johnson*, - - - - - 207
7. One of two joint complainants has a right under our statute to amend the bill by striking his name as complainant, and inserting it as defendant. *Pool and wife vs. Morris et al.* - - - - - 374
8. A Court of Chancery has power to allow a defendant to amend his answer, by striking out a part of it. *Oliver vs. Persons*, - - - - - 568
9. It is unnecessary to make one, or the representatives of such an one, a party to a bill, whose name appears in a bond or agreement, as payee or obligee, when such an one had no real or actual interest in the transaction, nor could take any benefit under it, especially when it

appears that the name was inserted therein, solely for the benefit of a third person named in the bond or agreement. *Lang vs. Brown*, - - - 628

10. An allegation in an answer, not in response to any charge in the bill, and unsupported by proof, is not to be considered by the jury as evidence. *Cartledge, guard., vs. Cutliff, et ux.* - - - 758

ESTOPPEL.

See *Vendor and Purchaser*, 1.



EVIDENCE.

1. Where a complainant places a *fi. fa.* in the hands of defendant to be collected, and the money used for a particular purpose, proof that the Sheriff collected the money affords a presumption that the defendant (who is legal owner of the *fi. fa.* by transfer) has got the money, because it places the money where he may easily get it, and where, if he does not get it, the failure is his own fault. *Gilmore vs. Johnson*, - - - 67

2. The defendant in ejectment, proved the existence, and loss or destruction, of a grant; he also proved that a copy-grant was not to be had from the Secretary of State's office.

Held, That on this foundation, a certificate from the Executive Department, that the grant had issued, was admissible. *Day et al. vs. Huggins*, - - - 78

3. It is error to receive the sayings of a guardian in his own favor, offered by himself or his administrator. *Royston and wife vs. Royston, adm'x*, - - - 82

4. Hearsay is not admissible against a party, unless he assents to it. *Phillips vs. The State*, - - - 105

5. If the proof to rectify a written contract, is sufficient to satisfy a jury beyond a reasonable doubt, it is as much as is necessary. *Durham and wife vs. Taylor, ex'or*, - - - - - 166
6. When a party proposes to prove that a certain amount of notes was turned over to another, in part payment of a demand, it is not necessary to produce the notes so turned over, the rule concerning the degrees of evidence not applying to such a case. *Daniel vs. Johnson*, 207
7. It is legal to prove that notes so turned over, were to be applied, not to the demand sued on, but to what the defendant owed the plaintiff, on account of their partnership debts paid off by the plaintiff, and such notes so paid off are admissible as corroboration of the other proof. *Id.*
8. It is error to give charges on a state of facts not shown by the evidence. *Id.*
9. A had a judgment on B., founded on a debt he held on B.; C. as A's agent or attorney, for collecting the debt, was to receive ten per cent. as commissions, on the amount collected of the debt.
Held, That C. was not a party or a privy to the judgment, and therefore, that it was not admissible as evidence against him. *Nesbit vs. Cautrel et al.* - - - 255
10. Gestures or exclamations or bearing, which are used as voluntary vehicles of thought, are an *acted language*, which is no more admissible in evidence in a man's favor, than his spoken words to the same effect would be. *Bowie & Co. vs. Maddox et al.* - - - 285
11. A party on the record, who at the trial, has no interest in the event of the suit may be examined as a

- witness. *The Central Railroad & Banking Co. vs. Hines, Perkins & Co.* 19 Ga. Rep. 203, *affirmed*. *Foster et al. vs. Leeper et al.* - - - 294
12. The copy of a letter purporting to have been written by defendants to plaintiffs, is inadmissible, there being no proof that it was ever received or even sent. *Foster et al. vs. Leeper et al.* - - - 294
13. Muniments of title proven to have been in existence for forty years, with possession in conformity, and coming from the proper custody, are admissible as *ancient documents*. *Bell vs. McCawley, ex'or,* - 356
14. A recorded deed of personal property is entitled to go in evidence without other proof. *Id.*
15. The presumption of a gift arising from the delivery of personal property by a parent to a child, may be rebutted by subsequent acknowledgments of the child that he is holding, and has held from the beginning, under a loan. *Id.*
16. The contents of a lost paper are not to be inferred from a *name* which the witnesses may give the paper, in opposition to proof of its terms. The contents determine the name, and not a name the contents. *Id.*
17. A party to a suit is incompetent as a witness for his co-party, as long as he remains liable for the costs. *Wilkes vs. McClung & Co.* - - - 371
18. The admissions of a life-tenant are not evidence against the remaindermen; they are not privies in estate—a privy being a successor to the *same estate*, and not to a different estate in the same property. *Pool et ur. vs. Morris et al.* - - - 374
19. Under an indictment for carrying a negro out of a county, the beginning of the offence is the commence-

ment of the carrying, and the end of it is the crossing of the county line ; and all that is done from the beginning to the end, and all that is said, is admissible in evidence as a part of the *res gestæ*. *Drumright vs. The State*, - - - - - 430

20. The sayings of other persons are admissible against a party when it affirmatively appears that he assented to them by his silence, or in some other way. *Id.*

21. When the defendant justifies his act by showing the consent of a person whom he alleges to be the true owner, he cannot show the fact by *affidavits* of that person asserting a *claim* to the negro. *Id.*

22. The admissions of parties are not to be regarded as an inferior kind of evidence, but the testimony which proves that admissions were made, and the terms in which they were made, should be scanned with caution. *Ector vs. Welsh et al.* - - - - - 443

23. The defendant introduced a deed purporting to be the deed of B. S. After the evidence had closed, the plaintiff offered a witness to prove the deed a forgery. The defendant objected to the proof, insisting that it came too late ; and if not, that there was better evidence, namely : that of the subscribing witnesses ; and also, that the proposed evidence was irrelevant. *Held*, That the objection was not good. *Wells vs. Walker, guardian*, - - - - - 450

24. Threats by the deceased are not admissible in evidence when they were unknown to the slayer, and where the deceased did nothing in the conflict except to defend himself. *Lingo vs. The State*, - - - - - 470

25. Communications between husband and wife are protected from disclosure, even after the relation has ceased. *Id.*

26. When the existence of superior evidence is shown, inferior evidence is not admissible until it is also shown that the superior is not attainable. *Raines et al. vs. Perryman*, - - - - - 529
27. On an issue of will or no will, the executor presented himself as a witness, to prove the affirmative; and to render himself competent, he offered to deposit a sum sufficient to pay the costs.
Held, That he would still be interested in the event of the suit, to the extent of the costs; because, if he gained the case, the costs would come out of the other party, and he would get back his deposit. *Adams et al. ex'ors, vs. Sandige et ux.* - - - - - 563
28. When the defendant's manner of leaving a place is introduced to show that he was absconding, his sayings, at the time of leaving, as to where he was going, are a part of the *res gestæ*. *Oliver vs. Wilson*, 642
29. To entitle a party to the benefit of a written admission of what an absent witness would prove, were he present, it must be put in evidence, and read to the jury, by the party claiming the benefit of it. *Pournell vs. The State*, - - - - - 681
30. The presumptions arising against an accused, from the fact that a negro was seen going into his store-house after nine o'clock at night, and before day-break in the morning, with an empty bottle, and coming out directly after, with the bottle filled with whiskey, can not be rebutted by the fact that the owner knew that the negro was in, and permitted it; or that the overseer was present, saw him enter, and permitted him to do so; or from the fact that the wife of the accused, and perhaps a boy, were in the house with the accused at the time. *Id.*
31. The sayings of the former owner are inadmissible

- to prejudice the title conveyed, if made subsequent to the time when the title and property are parted with. *James vs. Kerby*, - - - - - 684
32. Admissions of an innkeeper that his guest has lost goods in his house, when proven by a witness who heard the admissions, are sufficient proof of the fact of loss to authorize the introduction of evidence to show the amount of the loss, although the innkeeper, when put on the stand as a witness, by the other party, may state that the admissions by him were founded solely on statements to him by the plaintiff. *Kitchens vs. Robbins*, - - - - - 713
33. When one party puts the other as a witness on the stand, under our statute he is entitled to have his belief as well as his knowledge. *Id.*
34. A guest having shown the loss of his goods at an inn by other evidence, is himself a competent witness to show the amount of the loss. *Id.*
35. The communications of one person to another are incompetent testimony, being hearsay only. *Johns vs. Johns*, - - - - - 718
36. If the husband makes a violent assault upon one who attempts the seduction of his wife, and her character for virtue is impeached, it is competent for the husband, when on trial for the assault, to give evidence in support of the general character of his wife for chastity. *Biggs vs The State*, - - - - - 723

EXEMPTION LAWS.

The Homestead Exemption Acts in this State do not protect property from judgments founded *on torts*; they apply expressly and exclusively to judgments founded on *contracts*. *Davis vs. Henson, Shiff*, 345

FRAUD.

1. Where parties settle a case of fraud with their eyes open, the settlement is binding. *Ham vs. Hamilton.* 40
2. To a bill filed by an administrator to recover assets, the defendant set up the statute of limitations. The complainant insisted that the defendants held by fraud; the defendants met that reply by insisting that the heirs had notice of the fraud, for the statutory period, before the suit. The Court charged that, if the heirs had such notice, the administrator was barred.
Held, That as there might have been debts to be paid by the administrator, and as the heirs might have been persons laboring under disabilities to sue, the charge was erroneous. *Barfield vs. King et al.* - 288
3. Where one person sells a note to another, representing it to be good, and knowing it to be worthless, the purchaser, when he discovers the fraud, may rescind the trade by tendering back the note, and after doing so, is no longer responsible for the use of proper means to collect the note. *Clayton & Kennedy vs. O'Connor,* 687

See *Agreement, Reformation of*, 1.

FRAUDS, STATUTE OF.

Letters written by defendant, acknowledging the terms of the contract, sufficient to take the case out of the statute of frauds. *Foster et al. vs. Leeper et al.* - 294

GRANTS.

1. To authorize the presumption that land granted by the State, in 1795, had reverted, there must be proof that neither the grantee, nor any one claiming under him, has been known or heard of for such a length of time as to warrant the conclusion that the land was

abandoned, or that the heirs of the grantee had become extinct, or that it had been escheated on account of the alienage of the grantee, or for some other cause.

Sutton vs. McLeod, - - - - - 589

2. The warrant for a survey of land upon an application under the head rights laws of this State, must be sufficiently certain, in its description of the lands to be surveyed, giving "the buttings and boundings," so that the survey can identify and enter upon the particular lands to be surveyed, from the description given in the warrant. *Miller vs. Woodard*, - - - - - 753

GUARDIAN AND WARD.

1. In charging rents against a guardian, for lands occupied by him, it is right to allow him credit for the full value of the improvements put on it by him; but then he must be charged with the rent as increased by this superadded value to the land. *Royston et ux. vs. Royston, adm'x*, - - - - - 82

2. It is proper, in estimating the value of rent, to receive evidence of the rent brought by neighboring lands of like quality, during the same time, and also evidence that, during that time, many neighboring lands lay idle, and that it was common there for renting plantations to be rented once in every four or five years for no price but repairs. *Id.*

3. There is no law authorizing the administrator of a deceased guardian to make returns to the Court of Ordinary, of moneys paid out for the ward, either by the guardian in his lifetime, or by the administrator afterwards; and such returns, when made, are not evidence for the benefit of the guardian. *Id.*

4. Where a guardian puts out the money of his ward at interest, and has to resort to suits to collect it back, it is

right to allow him reasonable attorneys' fees for the collection. *Id.*

5. The only Act (1792) which provides for a forfeiture of commissions, on account of a failure to make returns, does not embrace *guardians*; and these, therefore, are entitled to the commissions prescribed by the Act of 1764, without regard to their making or failing to make returns. *Id.*
6. The rule of interest against guardians, &c., is as follows: Up to the 1st January, 1848, simple interest is the rule, and compound interest the exception—simple interest except in the cases where there is fraud or gross negligence, and then compound interest, the compounding to be done at the end of each period of six years. And the *rate* of interest, whether simple or compound, is 8 per cent. per annum up to the 1st January, 1846, and after that, 7 per cent. per annum up to the 1st January, 1848. After 1st January, 1848, the Legislature has prescribed a rule of its own: 7 per cent. per annum for the first six years, without compounding, and 6 per cent. per annum, compounded annually. *Id.*
7. The failure of a guardian to make returns of the interest accumulated in his hands, is not by itself sufficient to authorize the finding of fraud, and the charging of compound interest. *Id.*
8. The disbursement of a guardian ought to be made out of interest, and not of principal. *Id.*
9. The guardian is entitled each year to retain in his hands, from the beginning of the year, without interest, enough of the funds to cover the disbursements of that year. *Id.*
10. The commission on interest to which a guardian is entitled, is $2\frac{1}{2}$ per cent. as the lowest limit, and 10 per

cent as the highest—the latter to be reached or not, according to the opinion the jury may form of the skill and fidelity with which he has managed the estate—the former the rule where interest accumulates in the hands of the guardian without *lending out*. But upon all interest *received* (from lending out) and paid away, he is entitled to at least 5 per cent.— $2\frac{1}{2}$ for receiving, and $2\frac{1}{2}$ more for paying away. *Id.*

11. Where a father, in limited circumstances, receives a fund, as guardian for his minor children, and by order of the Court of Ordinary, is allowed to retain the same without interest, the sum being small, as compensation for his trouble and expense in collecting the money, in managing it, and to aid him in the support and maintenance of his wards, and upon the intermarriage of two of them, settles with their husbands, paying them over the original amount, one of them, if not both, having full knowledge of all the facts, and upon a bill filed after the lapse of seventeen years from the settlement with the first, and seven or eight years since the settlement with the last, and the jury find for the defendant, a Court of Equity, under all the facts of the case, will not disturb the verdict. *Brown et ux. vs. McWilliams et al.* - - - - 194
12. Where a guardian makes annual returns of the conditions of his ward's estate, he will be allowed all reasonable charges for the education and maintenance of the ward, although they may exceed the income. The single circumstance of the excess does not render them improper or unreasonable. *Smith vs. Hilly et ux.* 582
13. That the guardian, having possession of such settled estate, was bound to provide the clothing of his ward out of that trust estate, instead of the ward's independent estate. *Cartledge, guard., vs. Cutliff et ux.* 758

14. A guardian is entitled to at least two and a half per cent. commissions on all interest that accumulates in his hands, on balance in his hands due the ward, notwithstanding his failure to make any statement thereof in his annual returns. *Id.*
15. A guardian who, in his answers to a bill filed against him for an account, appends a statement of the annual balances due by him to the ward, with a calculation of interest credits, or showing what he estimates the balance to be, is not entitled to have such statement or calculation to go to the jury as evidence, *if for any purpose.* *Id.*

HUSBAND AND WIFE.

1. Marriage gives to the husband such a title to the wife's land that he may, after her death, although he has never reduced it into his possession, sue for it, and recover it, without having administered on her estate. *Prescott et al. vs. Jones et al.* - - 58
2. Where husband and wife are parties on one side to an agreement for the benefit of the wife and children, and they have become entitled by an advantageous part performance by the other side, to a full performance for the benefit of the wife and children, the husband cannot defeat the rights of his wife and children by a release. *Gilmore vs. Johnson,* - - 67
3. The wife has an equity to a settlement out of her share in her father's estate, until her husband's marital right has attached to that share. *Lowe, ex'or, vs. Cody,* - - - - 117
4. Upon the death of the wife, having a separate property, the title in such property vests in the husband; and that right is not lost to his representatives, although

the husband failed to administer on his wife's estate during his lifetime. *Dwelle, adm'r, vs. Roath, ex'or,* 733

INFANTS.

1. An infant should always sue and be sued in their own name, and appear by guardian or next friend. And if an infant fail or refuse to appoint one, the Court, at the instance of the plaintiff, will do it for him. *Juck, for another, vs. Davis,* - - - - 219

2. A minor child, off at school, contracted an account with merchants, which his father paid. The next year the child contracted another account with the same merchants, which the father refused to pay. The first year, and also the second, the father caused the merchants to be notified that they were not to sell the son any goods without instructions from the man with whom the son was boarding. There was no evidence as to the amount and items of the second account. *Held,* That the father's paying the first year's account was not a fact from which it would be allowable to infer that he authorized the contracting of the second year's account. *Wilkes vs. McClung & Co.* - 371

INJUNCTION.

1. One member of a firm, after the dissolution of the partnership, will be restrained from publishing letters written to him by another member in the course of their business, and appertaining thereto, without the consent of the writer; it not appearing that the purpose of justice, civil or criminal, required the publication. *Roberts vs. McKee,* - - - 161

2. Where every charge in complainant's bill, upon which its equity depends, is fully met and denied by the defendant, the injunction will ordinarily be dis-

solved; especially when it is to restrain the collection of a debt, of more than thirty years standing, and for the recovery of which, a judgment has been obtained at law, upon the confession of the defendant. *Gravelly vs. Southerland*, - - - - 335

3. Where a creditor takes goods from his debtor on sale, in satisfaction of the debt, with a condition that the debt shall be re-opened and be collected if the goods should be taken away from him by older liens against the debtor, the creditor will not be enjoined, even before the condition has happened, so long as older liens remain outstanding, and the condition, therefore, remains in possibility, from putting his debt into judgment, in order to be in readiness to meet the condition to the best advantage whenever it may happen. He does no wrong, and will not be restrained, until he attempts to enforce his judgment. *Camp vs. Matheson et al.* - - - - 351

4. When a bill is presented for sanction, it is not a sufficient ground for refusing it that the same matter has already been passed upon in another case between the same parties. *Dulin vs. Caldwell & Co.* - - 362

5. When the allegations are stated feebly in the bill, and denied strongly in the answer, the injunction ought, in general, to be dissolved. *Williams et al. vs. Garrison*, - - - - 503

See *Easement*.

INSOLVENT DEBTORS.

A creditor is not bound by the discharge of his debtor, under the honest debtor's Act, unless it appears *in the "entry,"* on the minutes of the Courts, that such credi-

tor received notice of the debtor's intention to apply
for the benefit of the Act. *Odell vs. Hartsfield*, - 221

INTERROGATORIES.

Under our statute of 1854, (see *Acts* 1853-54, p. 49,) confining objections in trials in the last resort, against depositions taken under commission, after the case has been submitted to the jury, to those which are based upon irrelevancy, no objection on account of the evidence being hearsay will be entertained. STEPHENS dissenting. *Ector vs. Welch et al.* - - 443

JOINT TENANTS AND TENANTS IN COMMON.

1. One joint tenant cannot maintain ejectment against another, unless the defendant does something which amounts to a disclaimer of the title of his co-tenant. *Lawton et al. vs. Adams*, - - - 273
2. A joint tenant cannot maintain trover against his co-tenant, except in a case where one has taken several possession to the exclusion of the other; and in such a case, the measure of his recovery is the value of his interest in the particular property, after allowing his co-tenant the value of *his* interest in all other property covered by the same joint title, and held by the plaintiff adversely to his co-tenant. In other words, a recovery in such a case, is a severance of the joint tenancy, and the defendant may refuse a severance as to the part in his adverse possession, unless the plaintiff submits to a severance of that part of the joint property which may be held by him in the like adverse possession. *Roddy and wife, et al., vs. Cox*, - - 298

JUDGMENTS, MOTION IN ARREST OF.

A motion in arrest of judgment can be sustained only

upon such cause as is apparent upon the face of the record. *Reinhart vs. The State*, - - 522

JUDGMENTS.

1. A judgment cannot be vacated on account of grounds which could have been taken before judgment, but have been negligently omitted, or taken and overruled. *Barksdale, adm'r, et al. vs. Green*, - - 418
2. A judgment in a matter of discretion ought not to be disturbed without a strong reason. *Buchanan vs. Ford*, - - - - - 490

JUDGMENTS, FOREIGN.

The contents of a judgment or decree, rendered in the Courts of another State, cannot be proven by parol. *James vs. Kerby*, - - - - 684

LANDLORD AND TENANT.

Although the relation of landlord and tenant prevents the tenant from disputing the landlord's title, yet it does not prevent him from buying up a title, to be asserted after the termination of the tenancy and the redelivery of the land. *Williams et al. vs. Garrison*, - - 503

LEVY, WHAT CONSTITUTES.

To constitute a levy, there must be a seizure of the property by the officer, and a taking of it into his control. *Levy, Sheriff, vs. Shockley*, - - 710

LIENS, EQUITABLE.

A next friend having obtained a decree in chancery securing a remainder interest to the minors for whom

he acts, has an equitable lien on the estate which he has benefitted, for all proper expenditures of money made by him, but not for his personal services. *Daniel vs. Powell et al.* - - - - 730

2. The decree for his reimbursement should be so shaped as not to interfere with the preceding life estate, and to operate as a present lien upon the estate in remainder, to be enforced when the remainder falls into possession by the termination of the life estate. *Id.*

LIENS, STATUTORY

F. sells a town lot to R. and S., and takes their notes for the purchase money, giving them a bond to make titles, when the money is paid. The vendees go into possession, and employ C. to make certain improvements; C. files and records his mechanic's lien, and sues and recovers judgment on his claim against R. and S. In the meantime the purchasers finding they are unable to pay, agree to rescind the contract, taking up their notes and surrendering to F. his bond for titles. The lot is levied on by the *fi. fa.*, in favor of C., against R. and S., and claimed by F.

Held, That the property is not subject to the debt, notwithstanding F. had knowledge of the work, while it was being done, and made no objection. *Callaway vs. Freeman*, - - - - 408

LIMITATIONS—STATUTE OF.

1. Courts of Equity will not relieve from the bar of the statute of limitations, where a party has remained inactive from ignorance of his rights, nor do they relieve from the bar, unless the subject matter was pending in some Court before the bar attached. *Adams vs. Guerard*, - - - - 651

2. Under our statutes, the endorsement of a sealed instrument, although the signature of the endorser has no seal nor scroll attached to it, is itself a contract under seal, and the statutory bar applicable to it is twenty years. *Milledge vs. Gardner*, - - - 700
3. The claims of an endorser against the maker, to refund money which the endorser has paid on a judgment against him as such, though the judgment may be dormant, and the endorser may not have got control of it by an order of Court as prescribed by the statute, is never barred by the statute of limitations, so long as the endorser has it in his power to get control of the judgment and have it revived and paid. This he may do on a judgment obtained before the limitation Act of 1856, at any time within twenty years after the rendition of the judgment. *Id.*

LIFE ESTATE.

1. An assent to the life estate is an assent to the devise over, whether it be a vested or contingent remainder. *Gay vs. Gay*, - - - - - 549
2. When slaves are directed by the will to be divided between the remaindermen, and they are left by the tenant for life, in possession of one of the tenants in common, he is a fit and proper person to institute proceedings to make the division. *Id.*
3. If, after the death of the first taker, the executor by the will has a trust to perform, arising out of the property, the rule would not hold; for in that case the property must be subject to his control, and of course he must have the legal title. *Id.*

MARRIAGE SETTLEMENTS.

Before our Act of 1821, making every estate one in fee, unless some less estate be expressed by limiting words, a marriage settlement conveyed the entire legal estate in real and personal property to a trustee, and declared a trust in favor of the husband and wife during the life of the longest liver of them, with remainder to their children, without using words to expressly confine the remainder to a life estate, or to expressly extend it to a fee.

Held, That any resulting trust after the death of the children, was rebutted by a subsequent deed taken by the same parties, professing to follow the very same trusts expressed in the marriage settlement, and in doing so, expressing a trust in favor of the husband and wife during the life of the longest liver, with remainder to the children and their *heirs*. *Adams vs. Guerard*, 651

MERGER.

One estate can not be *merged* in another, unless both estates are owned by the same person in the *same right*.

Pool et ux. vs. Morris et al. - - - 374

MORTGAGES.

1. An agreement to execute a mortgage *in presenti*, the actual execution failing through inadvertence, does not constitute such a lien as will prevail against subsequent judgment creditors. *Price vs. Cutts, Sheriff, et al.* 142

2. If one, after selling personal property, retains possession, and subsequently, and while in possession, executes a mortgage to a third person, to secure a debt, the lien of the mortgage must prevail over the previous sale, if the mortgage was not fraudulent, and the mortgagees had no notice of the former sale, at or previous

to their taking the mortgage. *Dollner, Potter & Co. vs. Williams,* - - - - - 743

3. The declarations of the mortgagor, at and previous to the execution of the mortgage, the mortgagees not being present, and assenting to such statements, are inadmissible to prove notice to them of the former sale, or fraud in the mortgage. *Id.*

NEW TRIAL.

1. A new trial will be granted if the evidence is not sufficient to justify the verdict. *Cook vs. The State,* 75
2. New trial will not be granted on the ground that the verdict is contrary to the evidence, in a case where there is a conflict between a promissory note on the one side, and on the other a single witness who has a manifest bias in favor of the defendant. *Boon vs. Boon,* 134
3. New Trial Act construed: New trial will not be granted by Supreme Court for any error except such as might have hurt the party moving the new trial. *Id.*
4. The verdict of a jury will be set aside, and a new trial granted, when there is no evidence to warrant the finding. *Renwick vs. LaGrange Bank,* - - - 200
5. A verdict is not unsupported by the evidence where the evidence against the verdict is conflicting in itself, and where there is evidence in favor of it, consisting of the sayings of the person against whom it is rendered. *Goodwyn vs. Goodwyn,* - - - 225
6. A new trial will not be granted by this Court on the ground that the verdict is unsupported by the evidence, in a case where the evidence is highly conflicting, and a new trial is refused by the presiding Judge. *Coggin vs. Jones et al.* - - - - - 257

7. A new trial will not be granted on the ground of newly discovered evidence, where the evidence so discovered is merely cumulative. *Id.*
8. A defendant in a motion for a new trial can (generally) avail himself of only such defences as he has made during the trial. *McDaniel vs. Walker,* 266
9. If the evidence fully supports the verdict, it will not be set aside on the ground of excessiveness. *Foster et al. vs. Leeper et al.* - - - - - 294
10. That there is a mere preponderance of evidence against the verdict is not sufficient to authorize the granting of a new trial. *Smith vs. Smith,* - 365
11. A new trial will not be granted when the verdict is sustained by the evidence, and no injustice done. *Lang vs. Brown,* - - - - - 628

OFFENCES, HOW CREATED.

To confer power on a Judge to *try* offences, *creates* no offence. He must try according to *law*, and where there is no law there is no offence. *Adams vs. Mayor of Albany,* - - - - - 56

PARTNERS AND PARTNERSHIPS.

1. W. & P. were partners in trade. P. dies, and W. gives a mortgage to his representatives, to secure P's estate in the payment of an individual claim; and also to indemnify it against the payment of the firm debts. The mortgaged property is sold, and the money brought into Court. It was not pretended but that the estate of P. was solvent.
Held, That the creditors of the firm were not entitled to have this fund withheld from the administrators of P., and applied directly to their demands. *Wimpee et al. vs. Mitchell, adm'r,* - - - - - 277

2. Persons who, by their acts, hold themselves out as members of a firm, when they actually are not such members, are liable as such, only to those persons who have acted on the faith of the truth of the appearance.
Bowie & Co. vs. Maddox et al. - - - 285

POSSESSION OF PROPERTY BY DONOR AFTER GIFT.

- The single fact that a donor retains the possession of the property given, is sufficiently explained by showing that he is the parent, or stands *in loco parentis* to the donee, who is a minor and resides with him. *Ector vs. Welsh et al.* - - - 443

PRACTICE IN SUPERIOR COURT.

1. It is no error to allow counsel, while addressing the jury, to use and refer to a written argument. *Royston et ux. vs. Royston, adm'x*, - - - 82
2. It is error in the Court to submit to the jury an issue of fact, upon the assumption that there is evidence to authorize a finding, when there is no proof to warrant the assumption. *Renwick vs. LaGrange Bank*, 200
3. Where the process is endorsed on the back of the writ, it is sufficient, without stating the case, or naming the defendant; and were it defective, it is amendable. *Smith vs. Morris*, - - - 339
4. Plaintiff's attorney endorsed upon the declaration, in the Clerk's office, in vacation, the following entry: "I hereby discharge and dismiss the bail process, and bail sued out at the commencement of the action."
Held, That the effect of the entry was to dismiss the bail process only, and not the suit upon which it was granted. *Walker et al. vs. Scott*, - - - 392
5. Judgment is entered up against A. as principal, and

B. as security, on appeal; C., another security, being, through inadvertence, omitted.

Held, That upon a motion to amend the judgment so as to include C., A., the principal, was not entitled to notice. *Id.*

6. An agreement by the defendant, that he will waive all objections as to jurisdiction, &c., and which he denies and refuses to abide by, to be binding and enforceable by the Courts, should be reduced to writing. Are defendants in criminal cases liable to be taxed with the cost of witnesses, who are subpoenaed and sworn but not examined? Quere? *Huff vs. The State*, - 424

7. Pending an action with bail process in the Superior Court, the plaintiff took out an attachment on the same demand, returnable to the Inferior Court.
Held, That he had the right to do so. *Wood vs. Carter*, - - - - - 580

8. 53d Common Rule of Practice maintained. *Sutton vs. McLeod*, - - - - - 589

9. The parties being at issue on a claim case, agreed to, and did submit to the Court, the questions of law arising out of the will and codicil of D. W., as to the interest of D. G. W. under the same, and whether such interest be subject to executions against said D. G. W. The Court having decided such interest to be subject, *Held*, That the claimant was concluded by such decision only as to the question submitted. *Hodges, trustee, vs. Holiday et al.* - - - - - 696

PRINCIPAL AND AGENT.

No sayings of an agent are admissible against his principal, except what he says concerning his appointed business while he is doing it—*dum fervet opus*.
Sweet Water Man. Co. vs. Glover, - - - 399
Atlanta and LaGrange R. R. Co. vs. Hodnett, - 461

PRINCIPAL AND SURETY.

1. A surety being sued, pleaded that he had required the creditor to sue the principal, and that the creditor had failed to do so for three months.

Held, That evidence that the surety was indemnified by the principal, was admissible on this plea, as such indemnity would be a circumstance tending to show, either that the surety had never made such a requisition, or, that if he ever had, he had waived it. *Baily vs. New, adm'r*, - - - - - 214

2. If the surety give notice to the creditor to sue the principal, and then ask the creditor for indulgence, he waives the notice, provided his request was made before the expiration of three months after the notice, and provided it was a request for indulgence to his principal, not to himself. *Id.*

PURCHASER FOR VALUABLE CONSIDERATION.

1. The doctrine that a purchase for value, without notice, takes precedence of a prior gift, applies only to a case where the two conflicting titles are derived from the same source. *Bell vs. McCauley, ex'or*, - - - 356
2. The principle, that a *bona fide* purchaser, without notice, is protected, applies only where the legal title is in one person, and the equitable title in another. *Wells vs. Walker, guard.* - - - - - 450
3. A bond for titles with the purchase money paid, is not good against a subsequent conveyance, to a purchaser for value who purchases without notice of the bond, and records his conveyance in due time. *Allen vs. Holding et al.* - - - - - 485

RAILROADS.

The Act incorporating a railroad, contained this provision: "And no subscription shall be received and allowed, unless there shall be paid to the commissioners, at the time of subscribing, the sum of five dollars on each share subscribed." This provision was not complied with. The corporation, nevertheless, organized itself, by electing directors, &c., and commenced building the road, by contracting with persons to grade it, &c. Some of those persons were not aware of the failure to pay the five dollars a share, or the subscriptions for stock. Afterwards, one of the stockholders, who was aware of that failure when he became a stockholder, and who voted at the election of directors, and otherwise aided in setting up the corporation, applied to the Court for leave to file an information in the nature of a *quo warranto*, against the directors, to require them to show by what authority they exercised their powers. The Court rejected the application.

Held, That the Court did right. *Cole vs. Dyer*, - - 434

RECORDS, AUTHENTICATION OF.

A certificate in the following form: "The above and foregoing is a true copy," &c., is a sufficient authentication of a record. *Harden et al. vs. Webster, Parmelee & Co.* - - - - 427

SHERIFF.

A Sheriff is liable for the money due on a *fi. fa.* in his hands, if he refuses or fails to levy it on property which is pointed out to him by the plaintiff in *fi. fa.*, without

making any objection to making the levy for want of indemnity. The fact that the plaintiff points out the property, is indemnity to the extent of his ability to respond, and if that is not sufficient, the officer is bound to make the objection at once, so that it may be met and removed. *Levy, Sheriff, vs. Shockly,* - 710

SHERIFFS' FEES.

The Sheriff, or one who acts as his agent, *pro hac vice*, is entitled only to his prescribed fees for keeping negroes, stock, &c., although he works them profitably, and brings the product of their labor into Court for the benefit of creditors. *Price vs. Cutts et al.* - 142

SHERIFFS, RULE AGAINST.

The jurisdiction of a rule against a Sheriff, to account for *tax f. fas.*, placed in his hands, lies in the Inferior Court, and not in the Superior. *Bell vs. Brown, Sheriff,* - - - - - 212

SUPREME COURT.

The statute organizing the Supreme Court makes no provision for the hearing of *ex parte* cases. *Ex parte, Burney, adm'r,* - - - - - 33

SUNDAY.

On the party pleading the said Act of 1762, is the onus of showing, that the contract resisted, was made by the parties to it, in the exercise of "worldly labor, business, or work, of their ordinary callings." *Sanders vs. Johnson,* - - - - - 526

TROVER.

In trover, a deed to the plaintiff, from one who has no title, can give the plaintiff no right to recover. *Raines et al. vs. Perryman*, - - - 529

TRUSTS, WHEN EXECUTED.

Elcey Jones, a *feme sole*, possessed of an estate of land and negroes, in her own right, being about to marry, makes a marriage settlement, by which the whole estate is conveyed absolutely and irrevocably to a trustee, for the support and clothing of herself and family, (in which is included Mary S., an infant daughter by a former marriage, so long as she continued single and a member of the family) and at the death of the said Elcey, the estate to go to certain named children by a former marriage. The marriage takes place, and the husband takes possession of the property embraced in the marriage settlement, and becomes by appointment the guardian of the infant Mary S., who was entitled to a considerable estate in her own right.

Held, That the provision in the marriage settlement for the clothing of Mary S., while she remained a member of her mother's family, and previous to her intermarriage, was good as an executed trust, and a Court of Equity will compel its execution in her favor. *Cartledge, guard., vs. Culliff et ux.* - - 758

TRUSTEES.

When one conveyance to a trustee directs him to make another of the same kind to a third person, equity will dispense with the second conveyance, if the first will produce precisely the same *result*, operating as

a conveyance under the statute of uses. *Adams vs. Guerard*, - - - - - 651

WIFE'S EQUITY.

See *Husband and wife*, 3.

WILLS, EXECUTION, REVOCATION AND PROBATE OF.

1. The probate of a will made upon only five days notice to the widow of the testator, at a time when she is in a novel and distressed condition, is not probate *in solemn form* as to her. *Lively et al. vs. Harwell, ex'or*, - - - - - 509
2. A will being revoked by the subsequent execution of an inconsistent one, is it revived by the single fact that the subsequent will is itself afterwards revoked? *Id.*
3. A will having been last known in the custody of the testator, and not found after his death, is presumed to have been destroyed by him. *Id.*

WILLS, CONSTRUCTION OF.

1. Joseph McConnell died in 1840. By his will, he gave a life estate in his negroes to his widow. He directed that all of his children should have an equal share of his property. And at the division, which was to take place at the death of his wife, he gave Esther, a woman, to Sarah Wardlaw, his widowed daughter. Sarah afterwards, and since the death of the testator, intermarried with James Martin.
Held, That Sarah took an equal share only of her father's estate, to be ascertained and determined at the death of her mother; and that it vested in her *hus-*

band, James Martin. That the provision in the statute requiring claims, at administrator's sale, to be made previous to sale day, is directory only; and that failure to do so, does not invalidate the claim. *Martin, adm'r, vs. McConnell, adm'r,* - - 204

2. The ninth item of the will of John Coggin, deceased, was as follows: "I give to my daughter, Mary Scott, and her children, free from the disposition of any future husband, Anaky and her two children, viz: Floy and Martha; and Letty and her child Winny; and Minerva and Miles, and Rose and increase; and three hundred dollars in money or notes, at my death."
Held, That Mary Scott took, as joint tenant with her children, and not a life estate in the whole property.
Jackson and wife vs. Scoggin et al. - - 403

3. A bequest to trustees in trust for a son and his wife and children, and then more specifically stated to be for "the use of, and support and maintenance of the said son and his family, and the support and education and *settlement* of the children"—is a gift to the children of the entire beneficial interest, *subject* to the support and maintenance of their father and his wife and family, so long as the father and his wife and family may live. *Napier et al. vs. Napier,* - - 491

4. W. H. B. gave to each of his daughters, by will, certain property, "to them and their children, heirs of their body."
Held, That the daughters took respectively, an estate for life, remainder to their children, born and to be born, at their death. *Goss and wife vs. Eberhart,* 545

5. "I, LaFayette Ingram, make the following disposition of my property: Owing to the peculiar condition

of my property, and being desirous of keeping my negroes together as long as it can be done, and having the utmost confidence in my long tried friend, William Fraley, that he will entirely carry out my wishes and desires, as they may be expressed by me, either verbally or in writing; and well knowing that my said friend will, by this will, be able much more effectually to dispose of my estate, as I wish it done, than I could at this time do myself, and with much less trouble to himself, I hereby give to the said Fraley my entire estate, real and personal, notes and other debts due me, money and property of every kind.

"I nominate, constitute and appoint my friend William Fraley, executor of this my will, hereby revoking any and all former wills by me made, and declare this to be my only last will and testament."

Held, That the words accompanying the bequest in this will, created a trust, and would, had the trust been sufficiently declared, excluded all discretion in the legatee; but the testator having failed to declare the trust, the legatee did not take the estate beneficially, but held the same as trustee for the next of kin of the deceased.

Ingram et al. vs. Fraley, - - - 553

6. A testator, by the sixth item of his will, made in the State of Virginia, in 1793, where he resided, made the following bequest: "I lend to my grand-daughter, Jincey Jordan, during her natural life, the use and services of the following slaves and their increase, to-wit: Edy, &c., (which said negroes I had lent to my son, Henry Haily, at my discretion,) and at her decease, I give the said slaves and their increase to the heirs of her body, lawfully begotten. But if she should die without such issue, in that case, I give the said slaves and their increase to my grand-children, Letitia and Richard Hyde Haily, aforementioned, or the survivor

of them, and the heirs of their bodies, lawfully begotten. And in default thereof, then to my grand-sons, Henry and Hudson Haily, or the survivor of them, and their heirs forever."

Held, That Jincey Jordan took an estate tail in the negroes, which was enlarged by the laws of Virginia into an estate in fee simple. *Pournell et ux. vs. Harris*, 736

7. That the word "*lend*," used in said clause, imports the same sense as "*give*," and is so to be construed. *Id.*

8. That the gift of the *use* and *services*, in said item, carries the corpus of the property with the use. *Id.*

VENDOR AND PURCHASER.

One who, by acts or declarations, induces another to buy property, as the property of a third person, is thereby estopped from setting up title in themselves to said property; but to make such acts or declarations a bar, it should appear that they were known to the purchaser, and that he acted upon them, and not upon his own knowledge or judgment. *McCune vs. McMichael*, 312



